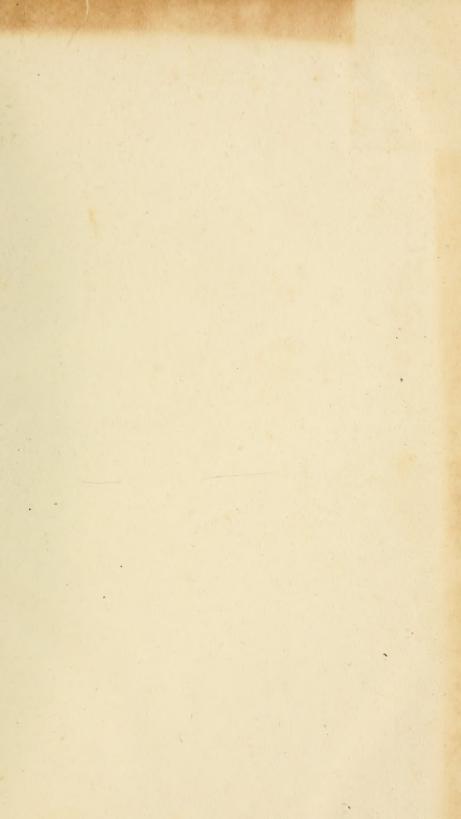


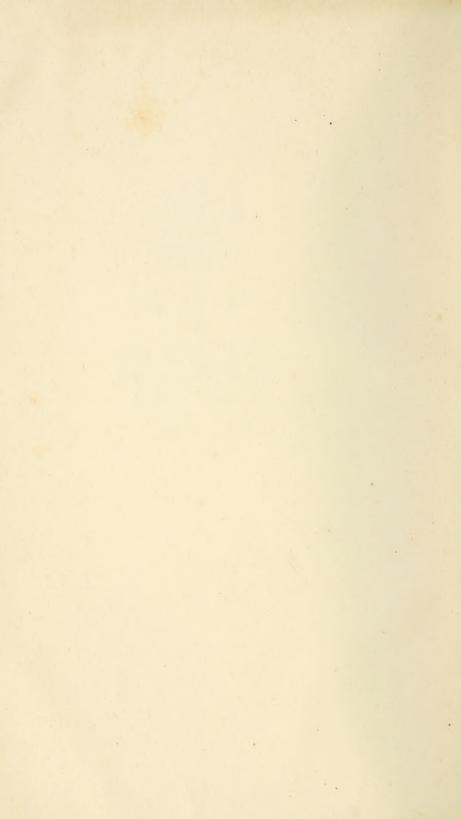


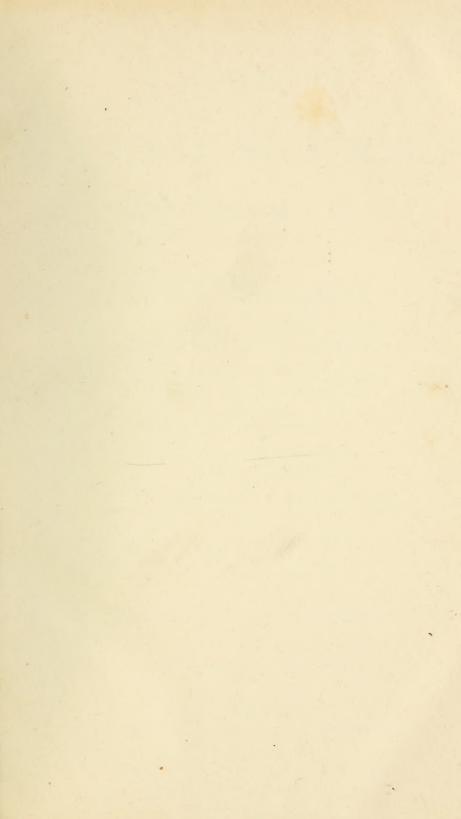


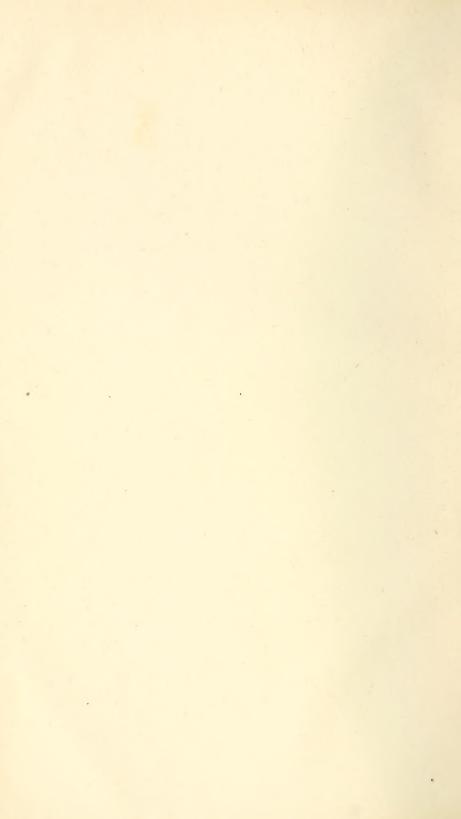
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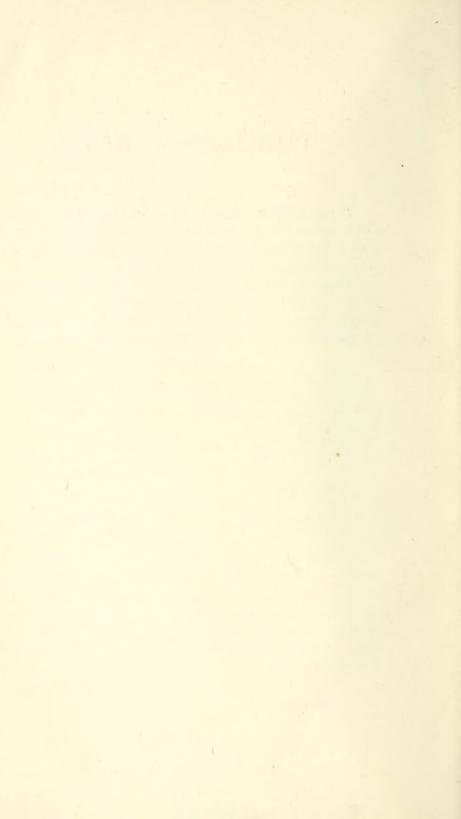
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It was originally announced that this edition of Smith's Leading Cases would be edited by Mr. Franklin Fiske Heard. Mr. Heard carried on the work for some time, and assigned a portion of the cases to his professional friends to be annotated by them. But the pressure of professional engagements compelled him to abandon the work. The publisher then employed other gentlemen to annotate the remaining cases.

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They desire to express their great obligation to Mr. W. H. Cross, of the Northern Circuit, for valuable assistance rendered to them throughout the preparation of this Edition.

R. H. C.

R. G. A.

TEMPLE, July, 1887.



TWYNE'S CASE.

MICH. 44 ELIZ. - IN THE STAR-CHAMBER.

[REPORTED 3 COKE, 80.]

What transactions are fraudulent within St. 13 Eliz. c. 5, and 27 Eliz. c. 4.

In an information by Coke, the Queen's Attorney-General, against Twyne of Hampshire, in the Star-Chamber, (a) for making and publishing of a fraudulent gift of goods. The case on the stat. of 13 Eliz. c. 5, was such: Pierce was indebted to Twyne in 400l., and was indebted also to C. in 200l. C. brought an action of debt against Pierce, and pending the writ, Pierce, being possessed of goods and chattels of the value of 300l., in secret made a general deed of gift of all his goods and chattels, real and personal whatsoever, to Twyne, in satisfaction of his debt; notwithstanding that Pierce continued in possession of the said goods, and some of them he sold; and he shore the sheep, and marked them with his own mark: and afterwards C. had judgment against Pierce, and had a fieri facias directed to the sheriff of Southampton, who by force of the said writ came to make execution of the said goods; but divers persons, by command of the said Twyne, did with force resist the said sheriff, claiming them to be the goods of the said Twyne by force of the said gift; and openly declared by the commandment of Twyne, that it was a good gift, and made on a good and lawful consideration. And whether this gift, on the whole matter, was fraudulent and of no effect by the said act of (b) 13 Eliz. or not, was the question. And it was resolved by

⁽a) Moor 638; Lane 44, 45, 47; Co. Lit. 3. b.; 76. a. 290 a.; 3 Keb. 259. See the stat. 27 Eliz. cap. 4.

⁽b) 5 Co. 60. a. b.; 6 Co. 18. b.; 10 Co. 56 b.; 3 Inst. 152; Co. Lit. 3. b.; 76. a. 290. a. b.; 13 El. c. 5; 2 Leon. 8, 9,

Sir Thomas Egerton, Lord Keeper of the Great Seal, and by the Chief Justices Popham and Anderson, and the whole court of Star-Chamber, that this gift was fraudulent, within the statute of 13 Eliz. And in this case divers points were resolved:

- 1. That this gift had the signs and marks of fraud, because the gift is general, without exception of his (a) apparel, or of anything of necessity; for it is commonly said, quod (b) dolosus versatur in generalibus.
- 2. The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.
- 3. It was made in secret, et dona clandestina sunt semper suspiciosa.
 - 4. It was made pending the writ.
- 5. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud.
- 6. The deed contains, that the gift was made honestly, truly, and bonâ fide; et clausulæ inconsuet' semper inducunt suspicionem.

Secondly, it was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Eliz., by which it was provided, that the said act shall not extend to any estate or interest in the lands, &c., goods or chattels, made on a good consideration and bonâ fide; for, although it is on a true and good consideration, yet it is not bonâ fide, for no gift shall be deemed to be bonâ fide within the said proviso which is accompanied with any trust. As if a man be indebted to five several persons in the several sums of 201., and hath goods of the value of 201., and makes a gift of all his goods to one of them, in satisfaction of his debt, but there is a trust between them that the donee shall deal (c) favorably with him in regard of his poor estate, either to permit the donor, or some other for

47, 223, 308, 309; 3 Leon. 57; Latch. 222; 2 Rol. Rep. 493; Palm. 415; Cr. El. 233, 234, 645, 810; Cro. Jac. 270, 271; Dy. 295, pl. 17, 351, pl. 23; 2 Bulst. 226; Rastal, Entries, 207. b.; Lane, 47, 103; Hob. 72, 166; Moor

638; Doct. pla. 200; Yelv. 196, 197; 1 Brownl. 111; Co. Ent. 162.

- (a) Godb. 398.
- (b) 2 Bulstr. 226; 2 Co. 34, a.; 1 Roll. Rep. 157; Moor 321.
 - (c) Goldsb. 161.

him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able, this shall not be called bona fide within the said proviso; for the proviso saith on a good consideration, and bonâ fide; so a good consideration does not suffice, if it be not also bona fide. And therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also: -1. Let it be made in a public manner, and before the neighbors, and not in private, for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3. Immediately after the gift, take the possession of them: for continuance of the possession in the donor is the sign of trust. And know, reader, that the said words of the proviso, on a good consideration, and bona fide, do not extend to every gift made bonû fide; and, therefore, there are two manner of gifts on a good consideration, scil., consideration of nature of blood, and a valuable consideration (a). As to the first in the case before put; if he who is indebted to five several persons, to each party in 201. in consideration of natural affection gives all his goods to his son, or cousin, in that case, forasmuch as others should lose their debts, &c., which are things of value, the intent of the act was, that the consideration in such cases should be valuable; for equity requires that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed that the father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his cradle; and therefore it shall be intended, that it was made to defeat his creditors; and if consideration of nature or blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt. And as to the gifts made bonû fide, it is to be known that every gift made bonâ fide, either is on a trust between the parties, or without any trust; every gift made on a trust is out of this proviso; for that which is betwixt the donor and donee, called (b) a trust per nomen speciosum, is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their

⁽a) Cr. Jac. 127; Palm. 214.

true and due debts. And every trust is either expressed or implied; an express trust is, when in the gift, or upon the gift, the trust by word or writing is expressed: a trust implied is, when a man makes a gift without any consideration, or on a consideration of nature, or blood only; and therefore, if a man, before the statute of 27 H. 8, had bargained his land for a valuable consideration to one and his heirs, by which he was seized to the use of the bargainee: and afterwards the bargainor, without a consideration, enfeoffed others (a), who had no notice of the said bargain; in this case the law implies a. trust and confidence, and they shall be seized to the use of the bargainee; so in the same case, if the feoffees, in consideration of nature or blood, and without a valuable consideration, enfeoffed their sons, or any of their blood, who had no notice of the first bargain, yet that shall not toll the use raised on a valuable consideration; for a feoffment made only on consideration of nature or blood, shall not toll an use raised on a valuable consideration, but shall toll an use raised on consideration of nature, for both considerations are in aquali jure, and of one and the same nature (b).

And when a man, being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, scil., that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin, and not see him want who had made such gift to him (c), vide 33 H. 6. 33 by Prisot, if the father enfeoffs his son and heir apparent within age, bona fide, yet the lord shall have the wardship of him: so note, valuable consideration is a good consideration within this proviso; and a gift made bona fide is a gift made without any trust either expressed or implied: by which it appears that as a gift made on a good consideration, if it be not also bona fide. is not within the proviso; so a gift made bona fide, if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration, and also bona fide.

To one who marvelled what should be the reason that acts and statutes are continually made at every parliament without

⁽a) See Stat. 1 Rich. 3, cap. 1, and Sanders on Uses 5th Ed. p. 21; 2 Roll. 779.

⁽b) 2 Roll. 779.

⁽c) 33 H. 6. 16; 7 Co. 39. b.

intermission, and without end; a wise man made a good and short answer, both which are well composed in verse.

Quæritur, ut crescunt tot magna volumina legis?
In promptu causa est, crescit in orbe dolus.

And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud. Note, reader, according to their opinions, divers resolutions have been made.

Between Pauncefoot and Blunt, in the Exchequer-Chamber, Mich. 35 & 36 Eliz. (a), the case was: Pauncefoot being indicted for recusancy, for not coming to divine service, and having an intent to flee beyond sea, and to defeat the Queen of all that might accrue to her for his recusancy or flight, made a gift of all his leases and goods of great value, colored with feigned consideration and afterwards he fled beyond sea, and afterwards was outlawed on the same indictment: and whether this gift should be void to defeat the Queen of her forfeiture, either by the common law, or by any statute, was the question. And some conceived that the common law which (b) abhors all fraud, would make void this gift as to the Queen, vide Mich. 12 & 13 Eliz.; Dyer (c) 295; 4 & 5 P. & M. 160. And the statute of (d) 50 E. 3, c. 6, was considered: but that extends only in relief of creditors, and extends only to such debtors as flee to sanctuaries, and other privileged places; but some conceived that the stat. of (e) 3 II. 7, c. 4, extends to this case. For although the preamble speaks only of creditors, yet it is provided by the body of the act generally, that all gifts of goods and chattels made or to be made on trust to the use of the donor, shall be void and of no effect, but that is to be intended as to all strangers who are to take prejudice by such gift, but between the parties themselves it stands good. But it was resolved by all the barons, that the stat. 13 Eliz. c. 5 (f), extends to it; for thereby it is enacted and declared, that all feoffments, gifts, grants, &c., "to delay, hinder, or defraud creditors and others of their just and lawful actions, suits,

⁽a) Lane 44, 45. Pauncefoot's Case.

⁽b) 3 Co. 78. a.

⁽c) 3 Co. 78. a. b.; Dyer 295, pl. 8, 9, 10, &c.; Lane 44.

⁽d) Co. Lit. 76. a.

⁽e) Cro. El. 291, 292; Lane, 45.

⁽f) Co. Lit. 3 b. 76. a. 290 a. b.; 3 Inst. 152.; 5. Co. 60. a. b.; 6. Co. 18 b.;

debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs," shall be void, &c. So that this Act doth not extend only to creditors, but to all others who had cause of action, or suit, or any penalty, or forfeiture, &c.

And it was resolved, that this word forfeiture should not be intended only of a forfeiture of an obligation, recognizance, or such like (as it was objected by some, that it should, in respect that it comes after damage and penalty), but also to everything which shall by law be forfeit to the king or subject. And therefore, if a man, to prevent a forfeiture for felony, or by outlawry, makes a gift of all his goods, and afterwards is attainted or outlawed, these goods are (a) forfeited notwithstanding this gift (b); the same law of recusants, and so the statute is expounded beneficially to suppress fraud. Note well this word (c) (declare) in the act of 13 Eliz., by which the parliament expounded that this was the (d) common law before. And according to this resolution it was decreed, Hil. 36 Eliz., in the Exchequer-Chamber.

Mich. 42 & 43 Eliz. in the Common Pleas, on evidence to a jury, between Standen (e) and Bullock, these points were resolved by the whole court on the statute of 27 Eliz. c. 4. Walmsley, J., said that Sir Christ. Wray, late C. J. of England, reported to him, that he and all his companions of the King's Bench were resolved, and so directed a jury on evidence before them; that where a man had conveyed his land to the use of himself for life, and afterwards to the use of divers others of his blood, with a future power of revocation, as after such feast, or after the death of such one; and afterwards, and before the power of revocation began, he, for valuable consideration, bargained and sold the land to another and his heirs; this bargain and sale is within the (f) remedy of the said stat. For although the stat. saith, "the said first conveyance not by him revoked, according to the power by him reserved," which

10 Co. 56 b.; Co. Ent. 162. a.; 1 Leon. 47, 308, 309; 2 Leon. 8, 9, 223; 3 Leon. 57; Latch. 222; 2 Roll. Rep. 493; Palm. 415; Cr. El. 233, 234, 645, 810; Cr. Jac. 270; 2 Bulst. 226; Hob. 72, 166; Yelv. 196, 197; 1 Brownl. 11; Dyer 295. pl. 17, 351, pl. 23; Rastal, Fraudulent Deeds; 1 Rast. Ent. 207 b.; Lane, 47, 103; Moor 638; Doct. pl. 200.

⁽a) Co. Lit. 250. b.

^{[(}b) Not so now; 33 & 34 Vic. c. 3.]

⁽c) Co. Lit. 76, a. 290 b.

⁽d) Hard. 397.; Standen and Bullock's Case.

⁽e) Moor 605, 615; Bridgm. 23; 5 Co. 60 b.; Palm. 217; Lane 22; 2 Jones 95.

⁽f) 1 Sid. 133.

seems by the literal sense to be intended of a present power of revocation, for no revocation can be made by force of a future power until it comes in esse; yet it was held that the intent of the act was, that such voluntary conveyance which was originally subject to a power of revocation, be it in præsenti or in futuro, should not stand against a purchaser bonâ fide for a valuable consideration; and if other construction should be made, the said act would serve for little or no purpose, and it would be no difficult matter to evade it: so if A. had reserved to himself a power of revocation with the assent of B., and afterwards A. bargained and sold the land to another, this bargain and sale is good, and within the remedy of the said act; for otherwise the good provision of the act, by a small addition, and evil invention, would be defeated (a).

And on the same reason it was adjudged, 38 Eliz., in the Common Pleas, between Lee and his wife executrix of one Smith, plaintiff, and Mary (b) Colshil, executrix of Thomas Colshil, defendant in debt on an obligation of 1000 marks, Rot. 1707. The case was, Colshil, the testator, had the office of the Queen's customer, by letters patent, to him and his deputies; and by indenture between him and Smith, the testator of the plaintiff, and for 600l. paid, and 100l. per ann. to be paid during the life of Colshil, made a deputation of the said office to Smith; and Colshill covenanted with Smith, that if Colshil should die before him, that then his executors should pay him 3001. And divers covenants were in the said indenture concerning the said office, and the enjoying of it; and Colshil was bound to the said Smith in the said obligation to perform the covenants; and the breach was alleged in the non-payment of the 3001., forasmuch as Smith survived Colshil; and although the said covenant to repay the 300l. was lawful, yet, forasmuch as the rest of the covenants were against the statute of (c) 5 E. 6, cap. 16, and if the addition of a lawful covenant should make the obligation of force as to that (d), the statute would

⁽a) Sed vide 2 Show. 46, post in notis, p. 37.

⁽b) 2 And. 55, 107; Godb. 213; Cro. El. 529; Moor 857; Ley 2, 75, 79.

⁽c) Style 29; Cro. El. 520; Cro. Jac. 269; Hob. 75; Co. Lit. 234 a.; 12 Co. 78; 3 Inst. 148, 154; 3 Keb. 26, 659, 660, 717, 718; 1 Brownl. 70, 71; 2 And.

^{55, 107; 3} Bulst. 91; 3 Leon. 33; 1 Rol. Rep. 157, 236; Goldsb. 180.

⁽d) 2 And. 56, 57, 108; 1 Mod. Rep. 35, 36; Hob. 14; 11 Co. 27. b.; 2 Roll. 28; Co. Lit. 234. a.; 2 Jones 90, 91; Cro. El. 529, 530; Cro. Car. 338; Godb. 212, 213; 1 Brownl. 64; Plowd. 68. b.; Moor 856, 857; Ley 75, 79.

serve for little or no purpose; for this cause it was adjudged, that the obligation was utterly void.

2d. It was resolved that if a man hath power of revocation, and afterwards to the intent to defraud a purchaser, he levies a (a) fine, or makes a feoffment, or other conveyance to a stranger, by which he extinguishes his power, and afterwards bargains and sells the lands to another for a valuable consideration, the bargainee shall enjoy the land, for as to him, the fine, feoffment, or other conveyances by which the condition was extinct, was void by the said act; and so the first clause, by which all fraudulent and covenous conveyances are made void as to purchasers, extend to the last clause of the act, scil., when he who makes the bargain and sale had power of revocation. And it was said that the statute of Eliz. hath made voluntary estates made with power of revocation, as to purchasers, in equal degree with conveyances made by fraud and covin to defraud purchasers.

Between (b) Upton and Basset in trespass, Trin. 37 Eliz., in the Common Pleas, it was adjudged that if a man makes a lease for years by fraud and covin, and afterwards makes another lease bonâ fide, but without fine or rent, reserved, that the second lease should not avoid the first lease.

For first it was agreed, that by the common law an estate made by fraud should be avoided only by him who had a former right, title, interest, debt, or demand, as by 33 H. 6, a sale in open (c) market by covin shall not bar a right which is more ancient: nor a covenous gift shall not defeat execution in respect of a former debt, as it is agreed in 22 Ass. 72; but he who hath right, title, interest, debt, or demand more puisne shall not avoid a gift or estate precedent by fraud by the common law.

2d. It was resolved that no purchaser should avoid a precedent conveyance made by fraud and covin, but he who is a (d) purchaser for money or other valuable consideration; for although in the preamble it is said (for money or other good consideration), and likewise in the body of the act (for money, or other good consideration), yet these words (good consideration) are

⁽a) 1 Co. 112 b. 174. a.; Co. Lit. 237. a.; Hob. 337, 338; Moor 605; 2 Rol. Rep. 337, 496; Winch. 65.

⁽b) Co. Ent. 676. b.; 19 Cro. El. 444, 445; Lane 45; Upton and Basset's Case.

⁽c) Plow. 46. b. 55. a.; Fitz. Replic. 15; Br. Trespass. 26; Br. Collusion 4; Br. Property 6; 2. Inst. 713; 14 H. 8, 8. b; 33 H. 6, 5. a. b.

⁽d) Cro. El. 445.

to be intended only of valuable consideration, and that appears by the clause which concerns those who had power of revocation, for there it is said, for money or other consideration paid or given, and this (paid) is to be referred to (money), and (given) is to be referred to (good consideration), so the sense is for money paid, or other good consideration given, which words exclude all consideration of nature or blood, or the like, and are to be intended only of valuable considerations which may be given; and, therefore, he who makes a purchase of land for a valuable consideration, is only a purchaser within the statute, and this latter clause doth well expound these words (other good consideration), mentioned before in the preamble and body of the act.

And so it was resolved, Pasch. 32 Eliz. (a), in a case referred out of the Chancery to the consideration of Wyndham and Periam, Justices: between John Needham, plaintiff, and Beaumont, Sergeant-at-law, defendant, where the case was, Hen. Babington seized in fee of the manor of Lit-Church, in the county of Derby, by indenture, 10 Feb. 8 Eliz. covenanted with the Lord Darcy, for the advancement of such heirs males, as well those he had begot, as those he should afterwards beget on the body of Mary then his wife (sister to the said Lord Darcy), before the feast of St. John Baptist then next following, to levy a fine of the said manor to the use of the said Henry for his life, and afterwards to the use of the eldest issue male of the bodies of the said Henry and Mary, begotten in tail, &c., and so to three issues of their bodies, &c., with the remainder to his right heirs. And afterwards, 8 Maii ann. 8 Eliz., Henry Babington, by fraud and covin, to defeat the said covenant, made a lease of the said manor for a great number of years to Robert Heys: and afterwards levied the fine accordingly: and on conference had with the other Justices, it was resolved, that although the issue was a purchaser, yet he was not a purchaser. in vulgar and common intendment: also consideration of blood, natural affection, is a good consideration, but not such a good consideration which is intended by the statute of Eliz., for (b) a valuable consideration is only a good consideration within that act. In this case, Anderson, C. J., of the Common Pleas, said, that a man who was of small understanding, and not able

⁽a) 1 And. 233; Needham and Beaumont's Case. (b) 2 Roll. Rep. 305, 306.

to (a) govern the lands which descended to him, and being given to riot and disorder, by mediation of his friends, openly conveyed his lands to them, on trust and confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same; and afterwards, he being seduced by deceitful and covenous persons, for a small sum of money bargained and sold his land, being of a great value: this bargain, although it was for money, was holden to be (b) out of this statute, for this act is made against all fraud and deceit, and doth not help any purchaser, who doth not come to the land for a good consideration lawfully and without fraud or deceit; and such conveyance made on trust is void as to him who purchases the land for a valuable consideration bonâ fide, without deceit or cunning.

And by the judgment of the whole court Twyne was convicted of fraud, and he and all the others of a riot.

STATUTE 13 Eliz. c. 5 (made perpetual by 29 Eliz. c. 5), after reciting that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been contrived of malice, fraud, covin, collusion. &c., to delay, hinder or defraud creditors, or others of their just and lawful actions, suits, debts, accounts, damages, &c., proceeds to declare and enact that every feoffment, &c., of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit. judgment, and execution made for any intent and purpose before declared and expressed, shall be as against that person, his heirs, successors, executors, &c., whose actions, suits, &c., are or might be in any wise disturbed, hindered, delayed, or defrauded, utterly void. By sect. 6, however, the act is not to extend to any estate or interest in lands, &c., on good consideration and bonâ fide, lawfully conveyed to any person, &c., not having notice of such covin, &c. This act was not by any means the first attempt of the legislature to foil covenous transactions, for by 3 H. 7, c. 4, "all deeds of gift of goods and chattels made or to be made of trust to the use of the person or persons that made the same deed of gift" are declared "void and of none effect." And by the prior act of 50 Ed. 3, c. 6, after reciting "that divers persons do give their tenements and chattels to their friends by collusion to have the profits at their will and after do flee to the franchise of Westminster, of St. Martin-le-Grand of London, or other such privileged places, and there do live a great time with a high countenance of another man's goods, and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt and release the remainstance. nant, it is ordained and assented that if it be found that such gifts be so made by collusion, that the said creditor shall have execution of the said tenements and chattels as if no such gift had been made." Another statute containing provisions on the same subject, 2 R. 2, c. 3 [has been repealed by 26 & 2" Vict.

c. 125, with, amongst other qualifications, this somewhat enigmatical one, that the repeal of that and other acts is not to affect any "principle or rule," &c., "derived by, in, or from the repealed enactment".

When it is attempted to invalidate a transfer of goods by showing it to fall within the provisions of 13 Eliz. c. 5, a question arises proper for the consideration of a jury, who are to say whether the transaction was bonâ fide, or a contrivance to defraud creditors. Where a bill of sale of chattel property is executed by a debtor to his creditor, purporting to convey the property to the vendee immediately, yet the vendor is after its execution suffered to remain in possession, a very strong presumption of fraud arises; for, as Lord Coke remarks in the principal case, continuance in possession by the donor is a sign of a trust for his benefit, and therefore in Edwards v. Harben, 2 T. R. 587, where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, and in the meantime the debtor died, whereupon the creditor took and sold the goods, he was held liable to be sued as executor de son tort for the debts of the deceased. See Shears v. Rogers, 3 B. & Ad. 363. Indeed, in Edwards v. Harben, the court went so far as to say, "This has been argued as a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance, per se, as makes the transaction fraudulent in point of law. That is the point we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent." See also Bamford v. Baron, ibid. in notis: Reid v. Blades, 5 Taunt. 212; Paget v. Perchard, 1 Esp. 205; Martin v. Perchard, 2 W. Bl. 702. Nay, Lord Ellenborough thought that if the vendor remained in possession of the goods after the sale thereof, the case was not bettered by the vendee's remaining in possession along with him; and, therefore, in Wordall v. Smith, 1 Camp. 333, where an action was brought against the sheriff of Middlesex for a false return to a writ of fieri facias sued out by the plaintiff against John Mason, and returned by the sheriff nulla bona, and upon the trial it appeared that Mason had, before the issuing of the fi. fa., assigned all his effects to a creditor, whose servant was immediately put into the house, and remained conjointly with Mason, Lord Ellenborough directed a verdict for the plaintiff, saying, "To defeat the execution there must have been a bonâ fide substantial change of possession. It is a mere mockery to put another person in to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colorable; there must be an exclusive possession under the assignment, or it is fraudulent and void, as against creditors."

However, though in Edwards v. Harben it was laid down in the express terms above stated, that an absolute sale without delivery of possession was, in point of law, fraudulent, the tendency of the courts has lately been to qualify that doctrine, and leave the whole circumstances of each case to a jury, bidding them decide whether the presumption of fraud deducible from the absence of a transmutation of possession shall prevail. And, indeed, it ought to be remarked, that even in Edwards v. Harben, the words of Buller, J., were, "If there be nothing but an absolute conveyance, without the possession, that in point of law is fraudulent;" by which his lordship may have intended, that where there was nothing—i.e., no facts whatever appearing in the case except the absolute conveyance and the non-delivery, that then the inference of fraud would be so strong, that a jury ought not to resist it. But it is very different in cases where, although the conveyance is absolute, and the possession has not passed, still there are surrounding circumstances which show that a fraud may not have been intended; in such cases it cannot properly be said, that there is "nothing

but an absolute conveyance without the possession." Therefore in Latimer v. Batson, 4 B. & C. 652, where the sheriff seized the goods of the Duke of Marlborough, and sold them to the judgment creditor, who sold them to the plaintiff, who put a man in possession, but allowed them to remain in the duke's mansion and be used by him as before, it was held that it was properly left to the jury to say whether the sale was a bonâ fide sale for money paid by the plaintiff; and that, if so, they should find a verdict for him. Here the goods had been seized by the sheriff, who is a public officer, and his seizure a public act, so that the transaction was accompanied with some notoriety, and as the secrecy of the transfer is a badge of fraud (see the principal case, and Mace v. Cammel, Loft. 782), so is the notoriety of the transfer always a strong circumstance to rebut the presumption thereof. See Latimer v. Batson; Leonard v. Baker, 1 M. & S. 251; Watkins v. Birch, 4 Taunt. 823; Jezeph v. Ingram, 8 Taunt. 838; Kidd v. Rawlinson, 2 B. & P. 59; Cole v. Davies, 1 Lord Raym. 724. [Macdona v. Swiney, 8 Ir. C. L. Rep. 73].

It may, therefore, be safely laid down, that, under almost any circumstances, the question, fraud or no fraud, is one for the consideration of the jury. See the judgments in Martindale v. Booth, 3 B. & Ad. 498, where several cases establishing this point are cited; and see in Carr v. Burdiss, 5 Tyrwh. 316, the expressions of Parke, B.; Dewey v. Bayntun, 6 East, 257; Reed v. Blades, 5 Taunt. 212; and per Tindal, C. J., Lindon v. Sharp, 6 Man. & Gr. 898; 7 Scott, N. R. 730, S. C. [Pennell v. Dawson, 18 C. B. 355; Darvill v. Terry, 6 H. & N. 807, S. C. 30 L. J. Exch. 254. In Biddulph v. Gould, Q. B.—11 W. R. 882—an exaggeration in the bill of sale of the amount of the consideration given was held not to invalidate it, though the misstatement was intentional; the jury finding that it was made innocently, though the making it was unbusinesslike. So, in Chancery there are no rules establishing particular circumstances to be indelible badges of fraud; but the question of bona fides is there also one of fact; Hale v. The Metropolitan Saloon Omnibus Co., 28 L. J. Ch. 777.]

The above observations apply to cases where the conveyance is absolute, and there is no transmutation of possession, but where the conveyance is not absolute to take effect immediately, as for instance, where it is by way of mortgage, and the mortgagee is not to take possession till a default in payment of the mortgage money, there, as the nature of the transaction does not call for any transmutation of possession, the absence of such transmutation seems to be no evidence of fraud. "We consulted," says Buller, J., in Edwards v. Harben, "with all the judges, who are unanimously of opinion, that unless possession accompanies and follows the deed, it is fraudulent and void; I lay stress on the words accompanies and follows, because I shall mention some cases where, though possession was not delivered at the time, the conveyance was held not to be fraudulent." And then his lordship proceeds to point out the distinction between "deeds, or bills of sale which are to take place immediately, and those which are to take place at some future time: for, in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule as accompanying and following the deed." See B. N. P. 258, and Cadogan v. Kennett, Cowp. 436; Minshull v. Lloyd, 2 M. & W. 450. This doctrine was affirmed and acted upon in the case of Martindale v. Booth, 3 B. & Ad. 505, and in Reed v. Wilmot, 7 Bing. 577. See also per Tindal, C. J., Reeves v. Capper, 5 Bing. N. C. 140. Cases may, and probably will, arise in which it may be attempted to take advantage of this doctrine for the purposes of fraud, by introducing terms consistent with the continuing possession of the vendor

into deeds really intended not to operate as a bonâ fide transfer of property, but to enure for the vendee's protection. In such a case, however, the collusion, as soon as discovered, would be held to invalidate the deed as much as if the conveyance purported upon the face of it to be absolute, for the presence or absence of fraud depends on the motives of the party making the conveyance. See Nunn v. Wilson, 8. T. R. 521; per Le Blanc, J., Riches v. Evans, 9 C. & P. 640.

[Thus, in cases of secret transfer not impeachable on the ground of fraud, or want of consideration, the 13 Eliz. c. 5, left the creditor liable to incur a loss by trusting to the false appearance of ownershlp which the debtor's continuance in possession presented. In the events of bankruptcy and insolvency this defect in the law was remedied by later statutes, which vested in the assignees, upon order of the court, all goods which by consent and permission of the true owner were in the debtor's possession, order, or disposition at the time of his bankruptcy (Ex parte Attwater, 5 Ch. D. 27; 46 L. J. Bcy. 41), or arrest, and of which he was then the reputed owner (12 & 13 Vict. c. 106, s. 125; 1 & 2 Vict. c. 110, s. 57). A similar provision is contained in s. 44, sub-sect. (iii), of the enactment now in force, 46 & 47 Vict. c. 52, and for the doctrine of reputed ownership in Bankruptcy, see the notes to Horn v. Baker, vol. ii., post.

But in general the secrecy of the transfer was not absolutely fatal to its validity, until the 17 & 18 Vict. c. 36, "An act for preventing frauds upon creditors by secret bills of sale of personal chattels," which in certain defined conditions avoided bills of sale of personal chattels both as against assignees in bankruptcy and execution creditors. This enactment is now repealed as to all bills of sale made after the 1st Jan., 1879, and the law is now governed by the Bills of Sale Act, 1878, and the Bills of Sale Act, 1878, Amendment Act, 1883, to which, however, the limits of this note do not permit more than a cursory reference. The former of these two statutes (41 & 42 Vict. c. 31) extended to all bills of sale made after the 1st Jan., 1879 (whether absolute or subject or not subject to any trust), whereby the holder or grantee had power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale. See s. 3.

By s. 4, the expression "bill of sale" is defined to include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached (Marsden v. Meadows, 7 Q. B. D. 80; 50 L. J. Q. B. 536), or receipts for purchase moneys of goods, and other assurances of personal chattels and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred (Reeves v. Barlow, 12 Q. B. D. 436; 53 L. J. Q. B. 192), but not the following documents: that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented.

Personal chattels are defined to mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but not to include chattel interests in real estate, nor fixtures (except trade machinery as thereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale.

By s. 5, trade machinery as defined by the act is also to be deemed to be personal chattels; and by s. 6, every instrument, except a mining lease, whereby a power of distress is given by way of security for any debt, and whereby rent is reserved as a mode of providing for the payment of interest on such debt, or otherwise for the purpose of the security only, shall be deemed to be a bill of sale of any personal chattels which may be seized or taken under such power of distress. The section does not extend to cases of demise by mortgagee in possession to the mortgagor as his tenant, at a reasonable rent, of any estate or interest in any land, tenement, or hereditament.

By s. 7, fixtures and growing crops are not to be deemed to be separately assigned if by the same instrument any freehold or leasehold interest in the land or building is conveyed to the same person. See *Ex parte Moon*, 14 Ch. D. 379, and notes to *Elwes v. Mawe*, vol. ii., post.

By s. S, every bill of sale to which the act applies shall be duly attested, and shall be registered under the act within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given (Ex parte Johnson, 26 Ch. D. 338; 53 L. J. Ch. 762), otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be) and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be).

S. 9 enacts that, where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the court having

cognizance of the case that the subsequent bill of sale was bonû fide given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this act.

S. 10 contains minute provisions for the attestation and registration of the bill, some of which have been repealed by the amending statute. Defeasances (Ex parte Popplewell, 21 Ch. D. 73; 52 L. J. Ch. 39) are to be deemed part of the bill and to be written on the same paper or parchment before registration. It further provides that bills of sale are to have a priority according to the date of registration, and that transfers (Horne v. Hughes, 6 Q. B. D. 676; 50 L. J. Q. B. 403) need not be registered: Ex parte Turquand, re Parkers, 14 Q. B. D. 636; 54 L. J. Q. B. 242.

Bills of sale, whether executed before the act or not, are (s. 11) to be re-registered every five years.

The definition of apparent possession is identical with that of the repealed Act of 1854. Personal chattels are to be deemed to be in the apparent possession of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person, see Ex parte Jay, L. R. 9 Ch. 697, 43 L. J. Bkcy. 122; Ex parte Fletcher, 5 Ch. D. 809, 46 L. J. Bkcy. 93; Ex parte Saffery, 16 Ch. D. 668.

Under this act, as well as under that of 1854, non-registration does not invalidate the bill as against the grantor. As between claimants, however, under bills of sale comprising in whole or in part the same chattels priority is determined by the date of registration (s. 10) whether there has or has not been bankruptcy or execution (Conelly v. Steer, L. R. 7 Q. B. D. 520; 50 L. J. Q. B. 326) in which respect the law as decided under the former act has been altered, see Richards v. James, L. R. 2 Q. B. 285. It will be seen however, that these distinctions are of no importance in the case of bills of sale falling under the act of 1882, as it renders absolutely void all bills of sale to which it applies which are not duly attested and registered (s. 8).

That act (45 & 46 Vict. c. 43) came into operation on the 1st Nov., 1882, and so far as is consistent with the tenor thereof is to be construed as one with the act of 1878. It does not apply to any bill of sale, duly registered before the act, so long as such registration is not avoided by non-renewal or otherwise, neither does it apply to any of the documents included under the term bill of sale in the act of 1878, which may be given otherwise than by way of security for the repayment of money.

By s. 4 every bill of sale shall have a schedule of the property attached, and shall be void, except as against the grantor, as to all personal chattels not specifically described.

Subject to certain exceptions of growing crops, and fixtures, plant, and machinery brought into the premises in substitution for those described in the schedule, bills of sale are rendered void, except as against the grantor, as to after-acquired property (ss. 5 & 6).

As to the effect of words assuming to pass the property in after-acquired chattels, see *Holroyd* v. *Marshall*, 10 H. L. C. 191; 33 L. J. Ch. 193; *Belding* v. *Read*, 3 H. & C. 955; 34 L. J. Ex. 212; *Clements* v. *Matthews*, 11 Q. B. D. 808; 52 L. J. Q. B. 772. In *The Official Receiver* v. *Tailby*, C. A., 18 Q. B. D. 25, reversing 17 Q. B. D. 88, the same question is discussed in the case of an assignment of future book debts.

S. 7 defines the causes for which alone possession may be taken by the

grantee, and gives the grantor power to apply to the Court within five days to restrain removal or sale.

SS. 8 & 9 avoid bills of sale not duly attested and registered, and not made in accordance with the form in the schedule, and such is the effect of the sections, even though the document is from its nature incapable of being shaped in the statutory form, and whether or not possession has been taken under it, Ex parte Parsons, re Townsend, 16 Q. B. D. 532; 55 L. J. Q. B. 137; overruling Re Cunningham, Attenborough's case, 28 Ch. D. 682; 54 L. J. Ch. 448; so far as it lays down the contrary. The act, however, does not apply to any case where the object and effect of the transaction are immediately to transfer the possession from the grantor to the grantee, per Cave, J., Ex parte Close, 14 Q. B. D. 386; 54 L. J. Q. B. 448; and therefore does not invalidate a document defining the terms on which goods have been pledged; Ex parte Hubbard, 17 Q. B. D. 690; 55 L. J. Q. B. 490, where the bearing of Ex parte Parsons on Ex parte Close was explained.

For recent instances of bills of sale avoided under these sections, see Furber v. Cobb, 17 Q. B. D. 459; 55 L. J. Q. B. 487; Bianchi v. Offord, 17 Q. B. D. 484; 55 L. J. Q. B. 486; and, for the limits of deviation permitted, Ex parte Stanford, 17 Q. B. D. 259; 55 L. J. Q. B. 341.

S. 10 provides for attestation by one or more credible witnesses, not being parties, and repeals the provisions of s. 10 of the former act as to attestation by a solicitor.

By s. 12 bills of sale given in consideration of any sum under thirty pounds are absolutely void.

S. 15 in terms repeals s. 8 of the act of 1878, but the effect of this section is qualified by the provision of s. 3 above cited, limiting the application of the later act to bills given by way of security for the payment of money by the grantor (which need not be money lent, Hughes v. Little, 18 Q. B. D. 32, C. A.), and s. 8 of the former act still governs all bills of sale registered before the amending act came into force or executed seven days before that date, and all bills of sale given otherwise than by way of security for the payment of money. Hickson v. Darlow, 23 Ch. D. 690; 52 L. J. Ch. 453; Swift v. Pannell, 24 Ch. D. 210; 53 L. J. Ch. 341.

S. 20 of the act of 1878 provides that registration shall have the effect of taking the goods comprised in a bill of sale out of the order and disposition of the grantor within the meaning of the Bankruptcy Act; but this section is repealed by s. 15 of the later act, and the law now stands as it did under the act of 1854, so far as regards bills of sale given by way of security since the 1st November, 1882, though as to such bills given before that date, and all absolute bills, the 20th section of the Act of 1878 still applies. Ex parte Izard, 23, Ch. D. 409; 52 L. J. Ch. 802; Swift v. Pannell, ubi. sup. In the case therefore of bills of sale given by way of security under the latter act, the doctrine of reputed ownership is unaffected by registration, which is only available as evidence in determining the question of fact, whether or not the goods assigned by it are in the order and disposition of the bankrupt with the consent of the true owner. Badger v. Shaw, 2 El. & El. 472; 29 L. J. Q. B. 73; Stansfield v. Cubitt, 27 L. J. Ch. 266, per Turner, L. J.; Ex parte Harding, L. R. 15 Eq. 223, 42 L. J. Bkey. 30, explaining Ex parte Homan, L. R. 12, Eq. 598. According to Malins, V.-C., in Ashton v. Blackshaw, L. R. 9 Eq. 516, the true test is whether the possession of the bankrupt is consistent with the terms of the deed, and if it is, the bill of sale, provided it be registered, will protect the mortgagee against the trustee. Accord. Ex parte Cox, 1 Ch. D. 302.]

There are some cases, that for instance of the sale of a ship at sea, in which an actual delivery being impossible, no presumption of fraud can possibly arise

from the substitution of one merely symbolical. Atkinson v. Maling, 2 T. R. 472. [In the case of British ships, notoriety of transfer is to a certain extent secured by the Merchant Shipping Act, 1854 (the 17 and 18 Vict. c. 104), which requires that when any registered ship, or any share in her, is disposed of to persons qualified to be owners of British ships, the transfer must be made by bill of sale, which must contain a description of the ship, and must be registered according to the provisions of that act. See ss. 55 and 57, and the 18 & 19 Vict. c. 91, s. 11. See on this stat. Stapleton v. Haymen, 2 H. & C. 418. This does not apply to a wreck or hulk which has lost the character of a ship. The European, &c., Mail Company v. The Peninsular & O., &c., Co., 14 W. R. 843.]

It will be observed that the statute of Elizabeth only declares the fraudulent conveyance to be void, "as against that person, his heirs, successors, executors, &c., who are, or might be in any wise disturbed, hindered, delayed, or defrauded." Such a conveyance is good as against the party executing it, Robinson v. M'Donnel, 2 B. & A. 134; and also as against any other person privy and consenting to it, Steel v. Brown and Parry, 1 Taunt. 381: [Olliver v. King, 25 L. J. Ch. 427;] and as against strangers other than creditors or bonû fide purchasers for valuable consideration, Bessey v. Windham, 6 Q. B. 166; (see, as to the question of evidence raised in the latter case, White v. Morris, 11 C. B. 1015); [and a person claiming under a voluntary post-obit bond is a creditor who may impeach a subsequent voluntary settlement, Adams v. Hallett, L. R. 6 Eq. 469. If before the conveyance is avoided the transferee assigns the goods to a bonâ fide purchaser for value, the transfer is valid. Morewood v. The South Yorkshire Railway Company, 3 H. & N. 798. A sham transfer for the purpose of defrauding creditors has been held not to pass the property in the goods even as between the debtor and his confederate, Bowes v. Foster, 2 H. & N. 779. In Manning v. Gill, L. R. 13, Eq. 485, 41 L. J. Ch. 558, a voluntary settlement made by a lunatic in prison on a charge of felony was after his acquittal held void as between himself and the donee. Under what circumstances the maker of a voluntary settlement may himself avoid it, see Phillips v. Mullings, L. R. 7 Ch. 244, 41 L. J. Ch. 211; Hall v. Hall, 41 L. J. Ch. 667, L. R. 8 Ch. 430; Dutton v. Thompson, 23 Ch. D. 278, 52 L. J. Ch. 661.]

In the principal case, Pierce, the grantor, was indebted to the grantee, Twyne, which debt would have been a sufficient consideration to support a bonâ fide transfer of the goods, and the ground on which the court proceeded was not that there was no sufficient consideration to sustain a grant by Pierce to Twyne. but that the secrecy, the non-delivery, the clausulæ inconsuetæ, &c., raised a presumption that the whole transaction was collusive and a juggle, and though purporting to be a sale, was, in reality, the creation of a trust for the benefit of Pierce; to use their own words, "it was resolved that, notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Eliz., by which it was provided that the said act shall not extend to any estate or interest in lands, &c., goods or chattels, made on good consideration and bonâ fide; for although it is on a true and good consideration, yet it is not bonû fide, for no gift shall be deemed to be bona fide, within the said proviso, which is accompanied with any trust." In other words, although a debtor has a right to prefer one creditor to another, and by making a transfer of his property to one favored claimant to defeat the other, provided he do so in an open manner, and without any further object than his act upon the face of it imports; - still the law will not allow a creditor to make use of his demand to shield his debtor, and, while he leaves him in statu quo by forbearing to enforce the assignment, to defeat the other creditors

by insisting upon it. Thus, (to illustrate this position by Lord Coke's words in the principal case,) "if a man be indebted to five several persons in the several sums of 201., and hath goods of the value of 201., and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them that the donee shall deal favorably with him in regard of his poor estate, either to permit the donor or some other person for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able; this shall not be called bonâ fide within the said proviso, for the proviso saith on a good consideration and bonâ fide, so a good consideration doth not suffice if it be not also bonâ fide."

There is, however, no doubt but that a debtor, [provided the transaction do not amount to a fraudulent preference under the Bankruptcy Act, 46 & 47 Vict. c. 52. hereafter considered], may openly prefer one creditor to the rest, and transfer property to him even after the others have commenced their actions, Holbird v. Anderson, 5 T. R. 235; Eastwick v. Caillaud, 5 T. R. 420; Goss v. Neale, 5 J. B. M. 19; Eveleigh v. Purssord, 2 Mo. & R. 539, Rolf, B. See however Owen v. Body, 5 A. & E. 28. Upon this footing stands a deed executed for the benefit of creditors, so soon as any creditor knows of and assents to it; Harland v. Binks, 15 Q. B. 713: [Wolverhampton and Staffordshire Banking Company v. Marston, 7 H. & N. 148; 30 L. J. Exch. 402; or without his assent, if the assignment be to a creditor and be communicated to him. Siggers v. Evans, 5 E. & B. 367; and Evans v. Jones, 3 H. & C. 423, where the transfer was by a trust deed under the Bankruptcy Act, 1861; and see Johns v. James, 8 Ch. D. 744; 47 L. J. Ch. 853; Spencer v. Slater, 4 Q. B. D. 13; 48 L. J. Q. B. 204; Boldero v. London and Westminster Discount Co., 5 Ex. D. 47].

And it is broadly laid down in Wood v. Dixie, 7 Q. B. 892, that a sale of property for good consideration is not, either at common law or under the statute, void merely because it is made with intent to defeat the expected execution of a judgment creditor [accord. Hale v. The Saloon Omnibus Company, 4 Drew. 492; Darvill v. Terry, 6 H. & N. 807; 30 L. J. Exch. 355; but see Bott v. Smith, 21 Beav. 511. But where a person known to be in a dying state assigned policies of insurance upon his life in consideration of a past debt of a much smaller amount, it was held that the assignment was void under the statute, except as a security for the sum actually due, Stokoe v. Cowan, 29 Beav. 637.] An assignment of all his effects in trust for his wife, by a man about to be tried for felony, has been held to come within this statute, and to be fraudulent and void as against the crown, Shaw v. Bean 1 Stark 319; Jones v. Ashurst, Skinn. 357; Morewood v. Wilkes, 6 C. & P. 145; and Pauncefoot's case, supr. p. 6. Vide R. v. Bridger, 1 M. & W. 145; [Saunders v. Wharton, 32 L. J. Ch. 224; cf. Manning v. Gill, L. R. 13 Eq. 485; 41 L. J. Ch. 558: but an assignment before conviction, by a person guilty of felony, will, if made for good consideration and bonâ fide, be good, Chowne v. Baylis, 31 Beav. 351; 31 L. J. Ch. 757, M. R. Stat. 33 & 34 Vict. c. 23, abolishes forfeiture for felony]. A deed has been held void which purported to create a trust for all the creditors, but contained terms which [might], if accepted, have imposed on them the liability of partners, Owen v. Body, 5 A. & E. 28. That case was, however, distinguished in James v. Whitbread, 11 C. B. 406; and Coates v. Williams, 7 Exch. 205 (where the power given to the trustees to carry on the business only extended to winding it up:) [and has been explained in Hickman v. Cox, 18 C. B. 817; 3 C. B., N. S. 523: 8 Ho. of Lords Ca. 268; 9 C. B., N. S. 4; which decides that the execution by the creditors of a deed by which the debtor assigns his property to trustees in trust to continue his trade, and apply the profits in discharge of their claims, does not make them partners.]

A deed of separation (reciting an agreement to separate in consequence of disputes), whereby the husband granted an annuity to trustees for his wife's benefit, has been holden void as against creditors, Clough v. Lambert, 10 Sim. 174; and see Frampton v. Frampton, 4 Beav. 287; Cowx v. Foster, 1 Johns. & Hem. 30. [And where an insolvent trader had sold his property, partly in consideration of an annuity to his wife if she survived him, she was, on his death, declared to be a trustee of the annuity for the creditors, French v. French, 6 De G. M. & G. 95, and see Neale v. Day, before Wood, V.-C., 28 L. J. Ch. 45, and Cornish v. Clark, L. R., 14 Eq. 184; so also a marriage settlement is void where there is an intent to defraud and delay the creditors, and the marriage is merely part of a scheme to protect the property from their claims, Columbine v. Penhall, 1 Sm. & Giff. 228; Bulmer v. Hunter, L. R. 8 Eq. 46: and though the marriage was bond fide and the settlor solvent at the date of the settlement, a general covenant in an ante-nuptial settlement made by a trader to settle all after-acquired property upon the wife and children was, independently of s. 91 of the Bankruptcy Act, 1869, held void as against creditors, In re Clint, L. R. 17 Eq. 115. See also where a deed of dissolution of partnership was held void against creditors as being malâ fide, Ex parte Mayou, 34 L. J. Bkcy. 25. As to the favor accorded in Chancery to family arrangements, see Penhall v. Elwin, 1 Sm. & Giff. 258, and p. 41, infra.]

A judgment and execution "contrived of malice" are within the same mischief and same rule as a gift or assignment. An early case on this subject is West v. Skipp, 1 Ves. sen. 244, in which it is laid down by Lord Hardwicke, that if a creditor seize the goods of his debtor and suffer them to remain long in his hands, this is evidence of fraud. See Lovick v. Crowder, 8 B. & C. 132; Imray v. Magnay, 11 M. & W. 267; Hunt v. Hooper, 12 M. & W. 664.

It has been said by Lord Mansfield, that "the principles of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by stat. 13 Eliz. c. 5" [and see per Lord Westbury, L. C., in Ex parte Mayou, ubi supra].

The question, whether a gift be fraudulent within the meaning of this statute, is very different indeed from the question, whether it would be fraudulent, and an act of bankruptcy within the meaning of the bankrupt act. The latter question may be answered in each case by reference to one of the following three rules:—

- 1. Any transfer which is fraudulent within the meaning of the statute of Elizabeth, is also fraudulent, and an act of bankruptcy under the bankrupt act; and void as against the assignees upon an insolvency, *Doe* d. *Grimsby* v. *Ball*, 11 M. & W. 531 [and the judgment of Lord Wensleydale in *Billiter* v. *Young*, 6 E. & B. 17].
- 2. Any conveyance to a creditor by [a debtor] of his whole property, or of the whole with an exception merely nominal, in consideration of a bygone and preëxisting debt, though not fraudulent within the statute of Elizabeth [(Alton v. Harrison, L. R. 4 Ch. 622; Ex parte Games, 12 Ch. D. 314)], is fraudulent under the bankrupt act, and an act of bankruptcy, Linden v. Sharp, 7 Scott, N. R. 730; 6 Man. & Gr. 896, S. C.; Graham v. Chapman, 12 C. B. 85 [explained in Ex parte Hauxwell, 23 Ch. D. 626; 52 L. J. Ch. 737]; Hutton v. Cruttwell, 1 E. & B. 15; Smith v. Cannan, 2 E. & B. 35; [Smith v. Timms, 1 H. & C. 849; 32 L. J. Exch. 215; Pennell v. Reynolds, 11 C. B. N. S. 709; Lomax v. Buxton, L. R. 6 C. P. 107, 40 L. J. C. P. 150; Allen v. Bonnett, L. R. 5 Ch. 577, and since the Bankruptcy Act, 1869, In re Wood, L. R. 7 Ch. 302; 41 L. J. Bkcy. 21; Ex parte Hawker, L. R. 7 Ch. 214; 41 L. J. Bkcy. 34; Ex parte Reed, L.

R. 14 Eq. 586; Exparte Norton, L. R. 16 Eq. 397. (As to the effect of the Bankruptcy Act, see infra.) And so even where there is a small fresh advance, for though the smallness of the fresh advance does not necessarily make the conveyance an act of bankruptcy, it affords strong evidence that the principal object of the parties in the whole transaction was not to enable the bankrupt to continue the trade, but to secure the grantee the repayment of his past advances; see Exparte Fisher, re Ash. L. R. 7 Ch. 644: 41 L. J. Bkey. 62. In the words of Mellish, L. J., in Exparte Ellis, 2 Ch. D. 797; 45 L. J. Bkey. 159: - "It is not a question whether the further advance is great or small, but whether there is a bonâ fide intention of carrying on the business." And see Ex parte Winder, 1 Ch. D. 290; 45 L. J. Bkcy. 14; Ex parte Greener, 46 L. J. Ch. 76; Ex parte Burton, 13 Ch. D. 102; Ex parte Kilner, 13 Ch. D. 245; Ex parte Wilkinson, 22 Ch. D. 788; 52 L. J. Ch. 657, explaining Exparte Dann, 17 Ch. D. 26; 51 L. J. Ch. 290. And the giving of further time to the debtor has been held to be a sufficient fresh consideration to render the conveyance valid; Philps v. Hornstedt, 1 Ex. D. 62; Ex parte Sheen, 1 Ch. D. 561; 45 L. J. Bkcy. 89; but see Ex parte Cooper, 10 Ch. D. 313; 48 L. J. Bkcy. 54.

But though rendered fraudulent and an act of bankruptcy as contrary to the spirit of the Bankruptcy Act, even where there is no actual fraud, such a conveyance did not become fraudulent in fact and for all purposes, and consequently in a case where such an assignment could not be treated as an act of bankruptcy because the debtor had become bankrupt on his own petition, and under the Bankruptcy Act then in force there was no relation back, it was held that it was not voidable by his assignees. See Jones v. Harber, L. R. 6 Q. B. 77; Mercer v. Peterson, L. R. 2 Ex. 304; secus of a transaction which amounted to a fraudulent preference; for this was voidable by the assignees even where it could not be treated as an act of bankruptcy. Marks v. Feldman, L. R. 5 Q. B. 275.] The note to Graham v. Chapman, 12 C. B. 94 (a), as to the date of the introduction of this rule into the Bankrupt Law, is erroneous, Law v. Skinner, 2 W. Bl. 996, having been decided in 15 Geo. III. (not 15 Geo. II., as there incorrectly stated), upon the authority of Worsley v. De Mattos, 1 Burr. 467, decided in 31 Geo. II., and see per Wills, J., in Lomax v. Buxton, ubi sup.].

3. A transfer by a [debtor] of part of his property to a creditor, in consideration of a bygone and preëxisting debt, though not fraudulent within the statute of Elizabeth [was before the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)], fraudulent, and an act of bankruptcy under the bankrupt act, if made roluntarily and in contemplation of bankruptcy; or if it otherwise had the effect of defeating or delaying creditors; Smith v. Cannan, 2 E. & B. 35; [Young v. Fletcher, 3 H. & C. 732; S. C. 34 L. J. Ex. 154; Bills v. Smith, 34 L. J. Q. B. 68.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), contains some important sections dealing specifically with the subject of this note.

By s. 4, par. b., a debtor commits an act of bankruptcy, "If in England or elsewhere (see Ex parte Crispin, L. R. 8 Ch. 374; 42 L. J. Bkcy. 65) he makes a fraudulent conveyance, gift, delivery, or transfer (see Philps v. Hornstedt, L. R. 8 Ex. 26; 1 Ex. D. 62; 42 L. J. Ex. 12; Ex parte Pearson, L. R. 8 Ch. 676; 42 L. J. Bkcy. 44) of his property or of any part thereof."

This provision 's substantially identical with s. 6, sub-s. 2, of the Act of 1869, under which it was held that although the words "with intent to defeat creditors," which were contained in the corresponding provision of the preceding act, were omitted from the definition, the old law was unaltered, and consequently a bill of sale of his whole property, executed by a debtor to secure a past debt, was held by the Lords Justices, overruling the decision of Bacon, C.

J., to be an act of bankruptcy. In re Wood, L. R. 7 Ch. 302; 41 L. J. Bkey.
 21, and see Ex parte Hawker, L. R. 7 Ch. 214; 41 L. J. Bkey.
 34.

S. 47 enacts "that any settlement of property not being a settlement made before and in consideration of marriage or in favor of a purchaser" (Ex parte Hillman, 10 Ch. D. 622; 48 L. J. Bkey. 77) "or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void as against the trustee under the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement, be void against the trustee in the bankruptey, unless the parties claiming under such settlement can prove that the settlor was, at the date of the settlement, able to pay all his debts without the aid of the property comprised in the settlement" (Ex parte Huxtable, 2 Ch. D. C. A. 54; 45 L. J. Bkcy. 59; Ex parte Russell, 19 Ch. D. 588; 51 L. J. Ch. 521). The latter part of the section deals with contracts in consideration of marriage for the future settlement of property, and settlement is defined to include "any conveyance or transfer of property."

This section is identical with s. 91 of the Act of 1869, except that it is not limited to traders. Its effect is to relieve the courts from all questions of fraud, actual or constructive, in dealing with voluntary settlements made by persons who have become bankrupt within two years afterwards, such settlements being by this section absolutely void; and further, where the settler has become bankrupt within ten years after making such a settlement, to throw upon the donees under it the onus of proving his solvency at the date of the settlement. S. 91 was held to be retrospective; Ex parte Dawson, L. R. 19 Eq. 433; 44 L. J. Bkcy. 49. The repeal of the former act does not affect any liability or disqualification incurred under it, S. 169.

Voluntary settlements made by persons who have not become bankrupt within the periods named are still governed by the statute of Elizabeth.

The doctrine of fraudulent preference laid down in the third of the above rules, which, though well established by a series of decisions originating in the time of Lord Mansfield, had never been embodied in any positive enactment, was for the first time specifically dealt with by statute in s. 92 of the Act of 1869, for which s. 48 of the Act of 1883 is now substituted.

That section enacts that "every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favor of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

Sub-s. 2. This section shall not affect the rights of any person making title in good faith, and for valuable consideration, through or under a creditor of the bankrupt.

This section is almost literally the same as s. 92 of the former act, except that sub-s. 2 is substituted for the proviso at the end of s. 92, saving "the rights of a purchaser payee or incumbrancer in good faith and for valuable consideration," which was held to apply to the creditor himself and not merely to his transferee, and had such an important effect in limiting the doctrine of fraudulent preference under that enactment, see *Butcher v. Stead*, L. R. 7 H.

L. 839; 44 L. J. Bkcy. 129. The present sub-section, it will be noticed, deals only with the position of persons claiming through or under the creditor.

A number of decisions had established that, apart from the effect of the proviso, the law of fraudulent preference under s. 92 of the late act was substantially the same as the old unwritten law. Ex parte Craven, L. R. 10 Eq. 648; affirmed on appeal, sub nom. Ex parte Tempest, L. R. 6 Ch. 70; 40 L. J. Bkey. 22; Ex parte Blackburn, L. R. 12 Eq. 358; Ex parte Bolland, re Cherry, L. R. 7 Ch. 24. The standards, however, of the old cases were not to be substituted for the express words of the enactment, which alone contained the law. Ex parte Griffith, re Wilcoxon, C. A. 23 Ch. D. 69; 52 L. J. Ch. 717. Assuming therefore the payment to be made by a person unable to pay his debts out of his own money as they become due, and that he has been adjudged bankrupt on a petition presented within three months afterwards, the point to be decided is whether the payment was made with a view of giving the payee a preference over the other creditors. This must be held to be the case if the real, effectual, substantial view was that of giving a preference, although it may not have been the sole view. Ex parte Hill, re Bird, L. R. 23 Ch. D. 695; 52 L. J. Ch. 903. It follows that payments which may have the effect of preferring a particular creditor may be unimpeachable, if made in the ordinary course of business or under pressure. See per Lord Blackburn, in Tomkins v. Saffery, L. R. 3 App. Ca. 213, at p. 235; 47 L. J. Bkcy. 11; but even though there was pressure, the dominant motive may have been to prefer. Ex parte Reader, L. R. 20 Eq. 763; 44 L. J. Bkcy. 139; Ex parte Bolland, re Gibson, 8 Ch. D. 230. Where, for instance, the pressure could not possibly have had any effect; as a threat to bring an action against a person who was already just about to become bankrupt. Ex parte Hall, re Cooper, 19 Ch. D. 580; 51 L. J. Ch. 556. On the other hand, the pressure may have been the determining cause, though bankruptcy was imminent. See Ex parte Lancaster, re Marsden, 25 Ch. D. 311; 53 L. J. Ch. 1123, where a preference was upheld in favor of the debtor's father-in-law.

Sec. 4, sub-s. (c), makes a fraudulent preference an act of bankruptcy, thus settling a point which was doubtful under the former enactment.

The present act, like its predecessor, makes a fraudulent preference void, not voidable, as was the case under the former law, the rights of persons making title in good faith under the preferred creditor being however protected by the sub-section.

It was held under s. 92 of the Act of 1869, that a transaction which took place more than three months before the bankruptcy, could not be impeached as a fraudulent preference. In re Liverpool & London, &c., Insurance Co., 30 W. R. 378.

It has been laid down that a voluntary conveyance is not fraudulent against creditors within the 13th Eliz., unless the party making it was indebted at the time or nearly so; Holcroft's case, Dyer, 294 (b); Stephens v. Olive, 2 Bro. Ch. C. 90; Lush v. Wilkinson, 5 Ves. 384; B. N. P. 257; and indeed Lord Alvanley has said that to invalidate a settlement made after marriage, by the 13th Eliz., the settlor must be in insolvent circumstances, 5 Ves. 384; see Shears v. Rogers, 3 B. & Ad. 362; Battersbee v. Farrington, 1 Swanst. 106; Russell v. Hammond, 1 Atk. 15; Middlecombe v. Marlow, 2 Atk. 220; Lord Townsend v. Windham, 2 Ves. 1, 10. In some instances, however, a contrary doctrine has prevailed: see B. N. P. 257; Townsend v. Westacott, 2. Beav. 340; 4 Beav. 58, S. C.: where the grantor was considerably in debt at the time, and insolvent within three years after: Scarf v. Soulby, 1 Mac. & G. 364; where Lord Cottenham approved of the decision in Townsend v. Westacott [French v. French, 6 De G. Mac. and

G. 95, where the fact that the creditors were delayed, and not the sufficiency of the estate, if realized, to pay all the debts, was considered to be the criterion]; and it would be difficult to contend that a conveyance proved to be made with the express intent to defraud even future creditors would not be void as against them, indeed that very point seems involved in Tarback v. Marbury, 2 Vern. 510, and Hungerford v. Earle, 2 Vern. 261 [Jenkyn v. Vaughan, 3 Drewry, 419; and Barling v. Bishop, 6 Jur. N. S. 812; and has been decided in later cases, see Ware v. Gardner, L. R. 7 Eq. 317; 38 L. J. Ch. 348]. And, if the conveyance does not leave the grantor enough to pay his present debts, he is for this purpose considered as if insolvent at the time of the conveyance. Jackson v. Bowley, 1. Car. & M. 97, Erskine, J. [But the deed may be void, though it do leave him enough, Spirett v. Willows, 34 L. J. Ch. 365; if the circumstances be such that the court infers fraud, see this explained in Freeman v. Pope, L. R. 5 Ch. at p. 543. See further, as to what constitutes insolvency, R. v. Saddlers' Co., 10 Ho. of L. Ca. 404; 32 L. J. Q. B. 337.

The result of the cases is thus stated by Wood, V.-C., in Holmes v. Penney, 3 Kay & J. 99: "The mere fact of a settlement being voluntary is not enough to render it void against creditors; but there must be unpaid debts, which were existing at the time of making the settlement, and the settlor must have been at the time not necessarily insolvent, but so largely indebted as to induce the court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the persons who at the time of making the settlement were creditors of the settlor. . . . Where, in order to evade the statute. a person being considerably indebted makes a voluntary settlement, which would be void if impeached by those who were then his creditors, and afterwards pays them off, and a new set of creditors stand in their places, . . . such a settlement would be void against the subsequent creditors, because it would be a fraud on the statute." In Spirett v. Willows, 34 L. J. Ch. 365, the Lord Chancellor (Westbury) says: "There is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors; but I think the following conclusions are well founded. If the debt of the creditor, by whom the voluntary settlement is impeached, existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement or deed of gift be impeached by subsequent creditors, whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent to 'delay, hinder, or defraud creditors,' or that after the settlement the settlor had no sufficient means or reasonable expectations of being able to pay his then existing debts; that is to say, was reduced to a state of insolvency, in which case the law infers that the settlement was made with intent to 'delay, hinder, or defraud creditors,' and is therefore fraudulent and void. It is obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement, or take it out of the statute. It still remains a voluntary alienation or deed of gift, whereby, in the event, the remedies of creditors, whose debts existed at the time, are 'delayed, hindered, or defrauded.'"

The above dicta were considered and commented on in the case of *Freeman* v. *Pope*, L. R. 9 Eq., at p. 211 per James, V. C., and L. R. 5 Ch., at p. 243 et seq., and the true test derivable from that and other cases would appear to be, not whether there be any debt in existence which was due prior to the settlement and which in the result has been unpaid although the settlor continued solvent

after making the settlement, but whether from all the circumstances the court can infer that the settlement was made with the intent, actual or constructive, of delaying or hindering creditors. The doctrine of Freeman v. Pope and other cases, that the settlor must be taken to intend the necessary consequences of his acts, was a good deal criticised in Ex parte Mercer, re Wise, 17 Q. B. D. 290; 55 L. J. Q. B. 558. The court, however, carefully abstained from deciding that a voluntary settlement may not be bad under the statute, although there was no actual intention to defraud. In the case itself, the facts negatived such actual intention, and the defeat or delay of creditors was by no means a necessary consequence of the settlement, which was therefore properly upheld. See also Crossley v. Elworthy, L. R. 12 Eq. 158; Mackay v. Douglas, L. R. 14 Eq. 106; 41 L. J. Ch. 539; Ware v. Gardner, L. R. 7 Eq. 317; Kent v. Riley, L. R. 14 Eq. 190; Taylor v. Coenen, 1 Ch. D. 636; Golden v. Gillam, 20 Ch. D. 389; 51 L. J. Ch. 503. In Mackay v. Douglas, ubi sup., it was laid down by Malins, V. C., that it was enough to vitiate a voluntary settlement if it appeared that the settlor at the time of making the settlement contemplated a state of things which might result in insolvency, although he continued solvent for some time afterwards; and accordingly a voluntary settlement of the bulk of his property made by a person about to embark in a hazardous trade, was held void at the suit of a subsequent creditor, although there were no creditors in existence whose debts were owing before the date of the settlement, and although the settler continued solvent for some time afterwards. Mackay v. Douglas was approved and followed in Ex parte Russell, 19 Ch. D. 558, C. A.; 51 L. J. Ch. 521. In Ex parte Stephens, re Pearson, 3 Ch. D. 807, a person not in trade and solvent executed a voluntary settlement of a sum of £1000 upon himself for life, determinable on bankruptcy, with further trusts for the benefit of his wife and children. Thirteen years later he embarked in trade. On his subsequent bankruptcy the settlement was set aside as fraudulent on its face.

Voluntary settlements made by persons who subsequently become bankrupts are dealt with by s. 47 of the recent Bankruptcy Act, as above mentioned.

It has been held to make no difference that the debt was contracted, not by the party making the conveyance but by his ancestor from whom he derived the estate, Apharry v. Bodingham, Cro. Eliz. 56; Gooch's Case, 5 Rep. 60; see Richardson v. Horton, 7 Beav. 112; and as a fraudulent conveyance by the heir is void, so is one by an executor or administrator of the property of the deceased, and he is chargeable with what he so conveys as assets, Doe v. Fallows, 2 Tyrwh. 460; 2 C. & J. 481. And property fraudulently conveyed by the deceased himself is, in contemplation of law, assets for payment of his debts in the hands of his executors, Shears v. Rogers, 3 B. & Ad. 363. By sec. 3 of st. 13 Eliz., parties to the fraudulent conveyance, bond, &c., forfeit a year's value of the lands or tenements conveyed, the whole value of the chattels, and the amount of any covenous bond, half to the crown, and half to the parties grieved; the assignees of an insolvent are parties grieved within this section, Butcher v. Harrison, 4 B. & Ad. 129; the fraudulent conveyance being void as against them. Doe d. Grimsby v. Ball, 11 M. & W. 531.

As a general rule, in the case of ordinary creditors, where the debtor is not dead, bankrupt, or insolvent, the statute of 13 Eliz. operates only upon property capable of being taken in execution. Thus, before 1 & 2 Vict. c. 110, it is found laid down that copyholds are not, generally speaking, subject to debts, *Matthews* v. *Feaver*, 1 Cox, Ch. Ca. 278, and the same is stated to be the law, since that statute, in a learned work, 1 Seriven on Copyholds, by Stalman, 146. It would seem, however, that the law is otherwise, since the 11th section of that statute has subjected copyholds, like other lands, to execution by elegit. With

regard to choses in action, it has been laid down by Lord Cottenham, in Norcutt v. Dodd, Cr. & Ph. 100, that a voluntary assignment of a chose in action is not fraudulent as against creditors, within the meaning of st. 13 Eliz., during the lifetime of the assignor, since it could not be reached by an execution. But that, after his death, it might be treated as fraudulent in a proceeding against the executor, because the chose in action would have been assets in his hands available towards payment of the creditors; and that in case of an insolvency it becomes fraudulent by the joint operation of 13 Eliz. c. 5, and the insolvent act. Pursuing this doctrine, it should seem [and, since the 4th edition of this work, has been decided] that a voluntary assignment of such choses in action as are seizable in execution by the provisions of 1 Vict. c. 110, would now be subject to the operation of 13 Eliz. c. 5. [Barrack v. M'Cullock, 3 Kay & J. 110; Stokoe v. Cowan, 29 Beav. 637.] And, with submission, an assignment of a chose in action (or other property not seizable in execution), under circumstances which (if the property were seizable) would make the conveyance void under 13 Eliz. c. 5, seems void in case of a subsequent bankruptcy or insolvency as against the [trustee], who, but for the assignment, would be entitled to the property, Norcutt v. Dodd, supra. In Sims v. Thomas, 12 A. & E. 536, it was laid down as a general proposition that a voluntary assignment of a bond (before 1 & 2 Vict. c. 110) was not void as against creditors; but the important distinction between an ordinary execution, under which the bond could not have been taken, and the statutory execution, so to speak, of an insolvency, does not appear to have been there adverted to. Perhaps it was considered not to rise upon the pleadings. [And see now s. 47 of the Bankruptcy Act, 1883, and the definition of property divisible among the creditors in s. 44.]

The effect of Eliz. c. 5 upon the sheriff's duty has been explained by the Court of Exchequer in *Imray* v. *Magnay*, 11 M. & W. 267; from which decision it follows that the sheriff is bound (at all events if he have notice of the fraud) to seize and sell, notwithstanding a fraudulent assignment or judgment and execution, and that if he do not, an action lies against him. That case was followed by *Christopherson* v. *Burton*, 3 Exch. 160, and recognized in *Shattock* v. *Carden*, 6 Exch. 727. In *Remmett* v. *Lawrence*, 15 Q. B. 1010, however, Lord Campbell expressed a wish to have the case of *Imray* v. *Magnay* reconsidered.

The statute 27 Eliz. c. 4, being in pari materià with the 13 Eliz. c. 5, is referred to in the text, in illustration of the doctrine there laid down, respecting the construction of the latter statute. The 27 Eliz. (rendered perpetual by 30 Eliz. cap. 18) was enacted for the protection of purchasers, as 13 Eliz. was for that of creditors. It enacts "that every conveyance, grant, charge, lease, estate, and limitation of use of, in, or out of any lands, tenements, or other hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons, bodies politic, &c., as shall purchase the said lands, &c., or any rent, profit, or commodity, in or out of the same, shall be deemed and taken, only against that person or persons, bodies politic, &c., and his or their heirs, successors, executors, administrators, and assigns, and against every one lawfully claiming under them who shall so purchase, for money or any good consideration, the said lands, &c., or any rent, &c., to be wholly void, frustrate, and of none effect."

Under this act it is held that not merely is a conveyance executed with express intention to defraud subsequent purchasers for value void as against them, see Burrell's Case, 6 Rep. 72; Gooch's Case, 5 Rep. 60; and Standen v. Bullock, cited ante, p. 7; but a voluntary conveyance is so likewise, even though the subsequent purchaser have notice of it. Goodright v. Moses, 2 W. Bl. 1019; Evelyn v. Templar, 2 Bro. Ch. C. 148; Doe v. Manning, 9 East, 59; Cormick v. Trap-

aud, 6 Dow, 60; for the very execution of a subsequent conveyance sufficiently evinces the fraudulent intent of the former one. It is, however, good as against the grantor, who therefore cannot as against a purchaser without notice compel specific performance of a subsequent contract to purchase for value, Smith v. Garland, 2 Mer. 123. See Wilkins v. Ormsby, 5 Beav. 153. [Although specific performance of such a contract may be enforced against himself, Rosher v. Williams, L. R. 20 Eq. 210, 44 L. J. Ch. 419. Nor can he resist an action by a purchaser who has refused the title to recover his deposit, Clarke v. Willott, L. R. 7 Ex. 313.]

The fifth section of the same statute enacts, that if any person shall make any conveyance of lands, with a clause of revocation, at his will and pleasure, of such conveyance; and, after such conveyance, shall bargain, sell, grant, demise, convey, or charge the same lands to any person or persons for money or other good consideration, the said first conveyance not being revoked, that the said first conveyance, as against such bargainees, vendees, lessees, their heirs, successors, executors, administrators, and assigns, shall be void and of none effect. See the observations on this section in the principal case. A power to mortgage to any extent is a power of revocation within the meaning of this section, Tarback v. Marbury, 2 Vern. 511. But a power to charge with a particular sum is, if no fraud be found, not so, Jenkins v. Kemish, 1 Lev. 152. A power to lease for any number of years, with or without rent, is also a power of revocation within this section; for both that and the mortgage power enable the party exercising them to defeat the estate in substance, Larender v. Blackstone, 2 Lev. 146. But a power to be exercised with the consent of third persons is not within this clause, unless, as in the case put in the text, they be under the control of the settlor, Butler v. Waterhouse, 2 Show. 46.

A mortgagee is a purchaser within the meaning of the 27 Eliz., Chapman v. Emery, Cowp. 279. [Dolphin v. Aylward, L. R. 4 H. L. 486.] As to an equitable mortgagee, see Buckle v. Mitchell, 18 Ves. 100; Lister v. Turner. 5 Hare. 281; Kerrison v. Dorrien, 9 Bing. 76. And so is a lessee at a rack rent, Goodright v. Moses, 2 Bl. 1019; or a person who releases a contested right in consideration of the conveyance to him, Hill v. Bishop of Exeter, 2 Taunt. 69; or the purchaser under a settlement made in consideration of an intended marriage, Douglas v. Ward, 1 Cha. Ca. 79; but not under a post-nuptial settlement, unless made in pursuance of articles entered into before marriage, Martin v. Scudamore, 1 Cha. Ca. 170, for one voluntary conveyance cannot defeat another, Clavering v. Clavering, 2 Vern. 473; 1 Abr. Eq. 24. And semble that the articles ought to be binding ones, Doe d. Barnes v. Rowe, 4 Bing. N. C. 737. A lessee without fine or rent is not a purchaser within the statute, Upton v. Bassett, Cro. Eliz. 444; cited also in Twyne's Case. | Nor is a judgment creditor. Bevan v. The Earl of Oxford, 6 De G. Mac. & G. 507; see Benham v. Keane, 31 L. J. Ch. 129.]

A will is looked on as a voluntary conveyance, Villiers v. Beaumont, 1 Vern. 100; Boughton v. Boughton, 2 Atk. 625. See 3 Swanst. 411, 414, in notis. [An assignment of leaseholds to which a responsibility is attached is not, Price v. Jenkins, 5 Ch. D. 619, 46 L. J. Ch. 214. Ex parte Doble, 26 W. R. 407. But see Lee v. Mathews, 6 L. R. Ir. 530; Shurmur v. Sedgwick, 24 Ch. D. 597; 53 L. J. Ch. 87. The principle of Price v. Jenkins has no application to cases arising under 13 Eliz. c. 5; Riddler v. Riddler, 22 Ch. D. 74, C. A.; 52 L. J. Ch. 343.] And there may be cases in which, on account of the inadequacy of the price, a question may arise, whether a subsequent conveyance, though some value pass, be not in effect voluntary, and a mere trick for

the purpose of invalidating a former one, *Doe* v. *James*, 16 East, 212. See an analogous case, *Persse* v. *Persse*, 7 Cl. & F. 279, *post*, p. 41 [and *Owen* v. *Owen*, 3 H. & C. 88].

It has been decided by Doe d. Newman v. Rusham [17 Q. B. 723, and Lewis v. Rees, 3 Kay & J. 132], in accordance with Parker v. Carter, 4 Hare, 409, and overruling the decision of the Court of Exchequer in Ireland in Moffett (lessee of) v. Whittaker, L. &. T. 141, that a bonâ fide purchaser for value from the heir-at-law or devisee of one who has made a voluntary conveyance is not within the statute. And the rule laid down in Doe v. Rusham equally excludes from the benefit of the statute a purchaser for value from a person claiming under a second voluntary conveyance, or from any other than the person who made the voluntary conveyance in his lifetime. For a like reason, in Richards v. Lewis, 11 C. B. 1035, where a woman before her marriage had executed a voluntary conveyance of leaseholds, it was held that upon her subsequent marriage, without any settlement the leaseholds did not vest in her husband as a purchaser for value under 27 Eliz.; for, though marriage is a valuable consideration, yet the husband taking merely by operation of law was not a purchaser within the statute. In both the last cited cases [and in Lewis v. Rees, 3 Kay & J. 141] it was laid down that the resolution in Burrell's Case, 6 Rep. 72, that "if a father makes a lease by fraud and covin of his land to defraud others to whom he shall demise or sell it (and all fraudulent leases shall be so intended), and before the father sells or demises he dies, and the son, knowing or not knowing of the lease, sells the land on good consideration, the vendee shall avoid the lease by the act 27 Eliz.," is to be understood as applying only to a case of actual fraud; and the case of Warburton v. Loveland, 6 Bligh, N. S. 30, is explained as having turned upon the construction of the Registry Acts.

In 27 Eliz, there is a proviso, sect. 4, similar to that in 13 Eliz, sect. 6, in favor of bona fide purchasers. Such are considered, persons taking under instruments made bonâ fide and for a valuable consideration, Roe v. Mitton, 2 Wils. 356; or under ante-nuptial settlements, Kirk v. Clark, Prec. in Cha. 275; or post-nuptial settlements made in consideration of ante-nuptial articles; or of an additional portion, Dundas v. Dutens, 2 Cox. 235; Jones v. Marsh, Forest, 63; Browne v. Jones, 1 Atk. 188; Spurgeon v. Collier, 1 Eden 55; or in consideration of the wife's joining to destroy an ante-nuptial settlement, Scott v. Bell, 2 Lev. 70; or of the husband giving up his interest in his wife's estate, Hewison v. Negus, Lords Justices [16 Beav. 294], 22 L. J. 655 [Teesedale v. Braithwaite, 5 Ch. D. 630; 46 L. J. Ch. 396; Shurmur v. Sedgwick, 24 Ch. D. 597; 53 L. J. Ch. 87]; as to the invalidity of a post-nuptial settlement of the wife's estate without such consideration [and of such a settlement when made in pursuance of a merely parol ante-nuptial agreement], see Butterfield v. Heath, 15 Beav. 408; 22 L. J. 270 [and Warden v. Jones, 2 De G. & Jones, 76; (the case of Butterfield v. Heath has, however, been recently questioned and distinguished by Jessel, M.R., in Re Foster and Lister, 6 Ch. D. 87; 46 L. J. Ch. 480, where the authorities are collected and reviewed)]; so also persons who between the voluntary settlement and the purchase have acquired as purchasers under the voluntary settlement any legal or even equitable right. Prodgers v. Langham, 1 Sid. 133. The East India Co. v. Clavell, Pr. Ch. 377, seems opposed to Prodgers v. Langham, but the latter case was not referred to in the former, and it was approved of by Lord Eldon, George v. Milbanke, 9 Ves. 193, and by Lord Kenyon, Parr v. Eliason, 1 East, 95, where it is called "a very leading authority." [See the case of The East India Co. v. Clavell, explained in Payne v. Mortimer, 28 L. J. Ch. 716], Smartle v. Williams, 3 Lev. 387; Skinn. 423;

Kirk v. Clarke, Prec. Cha. 275; Brown v. Carter, 5 Ves. jun. 862; George v. Milbanke, 9 Ves. 190; Meggison v. Foster, 2 Y. & C. C. C. 336.

There have been some cases in which the question has been, how far the consideration of marriage will extend, and whether limitations in favor of very remote objects may not be void as against subsequent purchasers. See Jenkins v. Kemish, Hard. 395; White v. Stringer, 2 Lev. 105; Osgood v. Strode, 3 P. Wms. 245; Ball v. Bamford, Prec. in Cha. 113; Reeves v. Reeves, 9 Mod. 132; Hart v. Middlehurst, 3 Atk. 371. In two of the latter cases on the subject a limitation to the issue of the settlor by a second marriage, was certified by the King's Bench not to be voluntary, Clayton v. Earl of Winton, 3 Madd. 302 [but see Wollaston v. Tribe, L. R. 9 Eq. 44]. And a limitation to the brothers of the settlor to be voluntary, Johnson v. Legard, ibid. 283 [Turn. & R. 294]; see Stackpole v. Stackpole, 4 Dru. & War. 326. So a limitation in a marriage settlement of the wife's land, in default of children, for the benefit of her brothers and sisters, has been holden void as against a bonâ fide purchaser for value from the husband and wife, Cotterell v. Homer, 13 Sim. 506. In Heap v. Tonge, 9 Hare, 104, the Vice-Chancellor Turner laid it down, that limitations in favor of collaterals are to be supported, if there be any party to the settlement who purchases on their behalf; and he referred to the example put by Lord Eldon in Pulvertoft v. Pulvertoft, 18 Ves. 92, where he says, "In the case for instance of a father, tenant for life, with remainder to his son in tail, they may agree upon the marriage of the son to settle not only on his issue, but upon the brothers and uncles of that son; and the question would be, whether they, though not within the consideration of the marriage, are not within the contract between the father and the son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other, I will not agree unless you will so settle." As to the validity of such a limitation between the contracting parties themselves, see Davenport v. Bishopp, 2 Y. & Col. C. C. 451. A settlement made by a widow about to take a husband upon the children of her former marriage, was upheld by Lord Hardwicke against a subsequent mortgagee, Newstead v. Serles, 1 Atk. 265; [and so In Clarke v. Wright, 5 H. & N. 401 (affirmed in Cam. Scace. 6 H. & N. 849; 30 L. J. Exch. 113), in a marriage settlement of the woman's property, was a provision for her illegitimate child; but in Smith v. Cherrill, L. R. 4 Eq. 390, it was held by Malins, V. C., that a provision in an ante-nuptial settlement made by a lady in favor of collateral relations, including a niece adopted by her as a daughter, was voluntary and void against a creditor at the date of the settlement; and see Price v. Jenkins, 4 Ch. D. 483; 5 Ch. D. 619; 46 L. J. Ch. 214].

The title of one who purchased for valuable consideration, from a person who had obtained a conveyance by fraud, of which he, however, had no notice, falls within the above proviso, and cannot be impeached. *Doe* v. *Martyr*, 1 N. R. 332.

The existence of a valuable consideration, though it should differ from the consideration specified in the instrument, may be proved, in order to rebut fraud and establish a right to the benefit of the proviso; thus, where a deed purported to be in consideration of love and affection, evidence was allowed that the grantor was under a bond to support the objects of it, *Gale* v. *Williamson*, 8 M. & W. 405; see *Pott* v. *Todhunter*, 2 Coll. C. C. 76.

The adequacy of the consideration is an important element in forming a conclusion as to the bona fides of the transaction. (See Doe v. James, 16 East, 212, ante p. 38.) In no case, however, can inadequacy of consideration alone be said, as a proposition of law, conclusively to establish mala fides. The relationship of the parties, and other circumstances, may explain away its primâ facie

effect. For instance, a conveyance in a deed, by way of family arrangement, part of the inducement to execute which is obviously natural love and affection, may be sustained by any valuable consideration not very inadequate, Persse v. Persse, 7 Cl. & F. 279. See Pott v. Todhunter, 2 Collyer, C. C. 76; Parker v. Carter, 4 Hare, 409 [Bayspoole v. Collins, L. R. 6 Ch. 228; Townend v. Toker, L. R. 1 Ch. 446]; Heap v. Tonge, 9 Hare 90, where an amicable settlement of a supposed claim under a lost will was upheld. The joinder of a necessary party in a conveyance is not always a sufficient consideration. It has been held not to be so where a limitation was made, not for his benefit or at his desire, nor in pursuance of any contract of his, Doe d. Baverstock v. Rolfe, 8 A. & E. 650.

The statute of 27 Eliz. was, perhaps, a more beneficial enactment than that of 13 Eliz., for it has been laid down, that at common law no fraud was remedied which should defeat an after purchase, but only that which was committed to defraud a former interest. Cro. Eliz. 445, and ante, p. 10, yet there is a dictum of Lord Mansfield's to the contrary, in Cadogan v. Kennett, Cowp. 434. The words of the act, it will be observed, are very large and comprehensive. They include every "conveyance, grant, charge, lease, estate, and limitation of use." Therefore, it has been held that the uses declared on a recovery might be void as against a subsequent purchaser, though the recovery itself remained valid and destroyed an estate tail for his benefit, Doe d. Baverstock v. Rolfe, 8 A. & E. 650; Tarleton v. Liddell, 17 Q. B. 390. Copyholds are within this act, Doe v. Bottriell, 5 B. & Ad. 131; Currie v. Nind, 1 Myl. & Cr. 17; Doe d. Baverstock v. Rolfe, 8 A. & E. 650. [So are equitable interests, Barton v. Vanheythusen, 11 Hare, 126.] But not personal property, Jones v. Croucher, 1 Sim. & Stu. 315, and Sugd. V. & P. 936, 11th ed.

There are also cases to which, from their nature, as importing the absence of valuable consideration, the statute of 27 Eliz. c. 4 does not, it seems, extend; for instance, a voluntary endowment of a charity is not defeated by a subsequent conveyance of valuable consideration, Corporation of Newcastle v. Attorney-General, 12 Cl. & F. 402.

All conveyances made to hinder, delay, or defraud creditors are fraudulent and void as to such creditors, both in those States in which the statutes of 13 Eliz. c. 5. and 27 Eliz. c. 4 are recognized as being in force, and in those which depend only upon their own legislation or upon the principles of the common law, to which resort is had for cases not reached by statute. It is the fraudulent intent on the part of the grantor

¹ Mann v. Appel, 31 Fed. Rep. 378; Robinson v. Holt, 39 N. H. 557; Mc-Michael v. Johns, 38 Iowa 696; Blackman v. Wheaton, 13 Minn. 326; Hicks v. Stone, Id. 434; Millett v. Pottinger, 4 Met. (Ky.) 213; Anderson v. Hooks, 9 Ala. 704; Hughes v. Roper, 42 Tex. 116; Tuttle v. Turner, 28 Tex. 759.

² Clements v. Moore, 6 Wallace 299; Cathcart v. Robinson, 5 Peters 263; Tiernay v. Claffin, 15 R. I. 220; Robinson v. Holt, 39 N. H. 557; Kimball v. Hutchins, 3 Conn. 450; Clark v. Douglass, 62 Penn. St. 408; Baltimore v. Williams, 6 Md. 235; Teasdale v. Atkinson, 2 Brev. 48; Brown v. Burke, 22 Ga. 574; Wright v. Howell, 35 Iowa 288; Gardner v. Cole, 21 Iowa 205; Anderson v. Hooks, 9 Ala. 704.

³ Westmoreland v. Powell, 59 Ga. 256; Davis v. Turner, 4 Grattan 422.

to delay or defeat his creditors, either by withdrawing his resources wholly from their reach,1 or by interposing any obstacle between their lawful process and his property, which, when embodied in a deed or sale,2 gives to his creditors the right to avoid that deed or sale so far as it operates an injury to them,3 and so far as it can be avoided without injury to the rights of innocent third persons.4 The intent actually to defraud creditors is not necessary; the design to hinder or delay them is sufficient.⁵ A debtor, though merely a surety, 6 has no right to place his property even temporarily beyond the reach of legal process; 7 and if he does this purposely, it is none the less a fraud upon his creditors, though he may intend that it shall ultimately be appropriated for their benefit.8 The creditor has a right to insist that no impediment shall be thrown in the way of his legal remedy by the debtor with the intent of delaying or defeating the enforcement of that remedy.9 The voluntary conveyance of an insolvent debtor has been held to be constructively fraudulent, and so void against his creditors; 10 and the same rule has been often applied to avoid a voluntary conveyance by a debtor who, though not then actually insolvent, yet does not retain sufficient property liable to execution to meet his debts. 11 If such

¹ Carter v. Coleman, 82 Ala. 177; Coffey v. Norwood, 81 Ala. 512; Chardavoyne v. Galbraith, Id. 521.

 2 Rice v. Perry, 61 Me. 145; Williams v. Davis, 69 Penn. St. 21; Bunn v. Ahl,

29 Id. 387; Alabama Ins. Co. v. Pettway, 24 Ala. 544.

 3 La Belle Iron Works v. Hill, 22 Fed. Rep. 195; Seymour v. Wilson, 19 N. Y. 417; McKibbin v. Martin, 64 Penn. St. 352; Quarles v. Kerr, 14 Grattan 48; Crow v. Beardsley, 68 Mo. 435; Pope v. Pope, 40 Miss. 516; Vasser v. Henderson, Id. 519; Winn v. Barnett, 31 Miss. 653; Swayze v. Doe, 13 Sm. & M. 317.

⁴ Wright v. Stanard, 2 Brock. 311; Thurber v. Sexauer, 15 Neb. 541; Quarles

v. Lacy, 4 Munf. 251; Braxton v. Gaines, 4 Hen. & M. 151.

⁵ Dunaway v. Robertson, 95 Ill. 419; Bixby v. Carskaddon, 55 Iowa 533; Pilling v. Otis, 13 Wisc. 495.

⁶ Gibson v. Love, 4 Fla. 217; Russell v. Stinson, 3 Hayw. 1.

⁷ German Bank v. Nunes, 80 Ky. 334; Borland v. Mayo, 8 Ala. 104; Planck v. Schermerhorn, 3 Barb. Ch. 644.

 8 McLean v. Lafayette Bank, 3 McLean, C. C., 587; Wheelden v. Wilson, 44 Me. 1; Dalton v. Currier, 40 N. H. 237; Kimball v. Thompson, 4 Cush. 441; Griffin v. Marquardt, 21 N. Y. 121.

⁹ Planters' Bank v. Willeo Mills, 60 Ga. 168; Sutton v. Hanford, 11 Mich. 513; Nicholson v. Leavitt, 10 N. Y. 591, and 6 N. Y. 510; Stovall v. Farmers' Bank, 16 Miss. 305; Pickett v. Pipkin, 64 Ala. 520.

¹⁾ Royer Wheel Co. r. Fielding, 31 Hun. 274; Blake r. Sawin, 10 Allen 340; Bohannon v. Combs, 79 Mo. 305; Reeves v. Sherwood, 45 Ark. 520.

¹¹ Barnes v. Vetterlein, 16 Fed. Rep. 218, 759; Collinson v. Johnson, 14 Id.

a conveyance appears to have been made for the purpose of putting the property out of the reach of the grantor's creditors,1 or as a means of dictating a settlement to them,2 it is presumptively fraudulent,3 and his creditors, or his assignee in bankruptcy or insolvency, may appropriate it by regular process of law.4 So, a voluntary conveyance made in anticipation of becoming indebted and for the purpose of avoiding payment is fraudulent, and may be impeached by any creditor, although the grantor was solvent at the date of the conveyance; 5 and conveyances by a man to his wife, shown by the evidence to be a mere sham and subterfuge and designed to defeat his creditors, are invalid against them.6 The general rule is that any conveyance, whether directly or indirectly made and of whatever form, is voidable by the grantor's creditors, if it was in fact made to defraud them; 7 and any act of the debtor by which his true title and ownership of property are concealed from the creditor, in order to prevent it from being seized on legal process, is a fraudulent concealment of such property.8 Such a fraudulent conveyance or concealment is absolutely null against creditors; and they may enforce their legal remedies against the property as if the title had not been embarrassed by the fraudulent act,9 or they may resort to the assistance of

305; 8 Sawyer 357; Doak v. Runyan, 33 Mich. 75; Williams v. Osborn, 95 Ind. 347; Williamson v. Wachenheim, 58 Iowa 277.

¹ Hudgins v. Kemp, 20 Howard 45; Fuller v. Ives, 6 McLean, C. C., 478; Iles v. Cox, 83 Ind. 577; Russell v. Dyer, 33 N. H. 186; Beers v. Botsford, 13 Conn. 146.

 2 May v. Tyler, 62 Miss. 500; Hooper v. Hills, 9 Pick. 435; Mobile Bank v. Harris, 6 La. An. 811.

³ Edwards v. Entwhistle, 2 Mackey 43; Odiorne v. Bacon, 6 Cush. 185; Holmes v. Barbin, 15 La. An. 553.

⁴ Hershy v. Latham, 42 Ark. 305; Lewis v. Lanphere, 79 Ill. 187; Alden v. Gibson, 63 N. H. 12; Newburn v. Woods, 52 Mich. 610; Getzler v. Saroni, 18 Ill. 511.

 5 Morrill v. Kilner, 113 Ill. 318; Churchill v. Wells, 7 Coldw. 364; Case v. Phelps, 39 N. Y. 164.

⁶ Platt v. Schreyer, 25 Fed. Rep. 83; Union Trust Co. v. Fisher, Id. 178; Curtis v. Wortsman, Id. 893; May v. Huntington, 66 Ga. 208; Foster v. Knowles, 42 N. J. Eq. 226.

⁷ Cothran v. Forsyth, 68 Ga. 560; Wise v. Moore, 31 Ga. 148; Davis Sewing Machine Co. v. Dunbar, 29 W. Va. 617; Buck v. Voreis, 89 Ind. 116.

⁸ O'Neil v. Glover, 5 Gray 144; Owén v. Arvis, 26 N. J. L. 22; Demarest v. Terhune, 18 N. J. Eq. 45; Knight v. Packer, 12 Id. 214; Smit v. People, 15 Mich. 497; Powell v. Matthews, 10 Mo. 49.

⁹ Thomason v. Neeley, 50 Miss. 310; Garretson v. Kane, 27 N. J. L. 208; Russell v. Fabyan, 34 N. H. 218; Gould v. Steinberg, 84 Ill. 170; White v. Gaines, 29 La. An. 769; Gaidry v. Lyons, Id. 4.

a court of equity to remove the obstacle if their remedy at law is inadequate.1 If an absolute deed is given in satisfaction of a mortgage which was itself given and taken merely to defeat the mortgagor's creditors, they may avoid both deed and mortgage.² Any conveyance or transaction of which the real purpose appears to have been to lock up the property beyond the reach of the grantor's creditors and to procure to himself some benefit from its use or its proceeds presents a case of a secret trust or confidence which is fraudulent as against his creditors.3 Such a conveyance, made really in trust for the debtor, has been held to be void as to his creditors as a matter of public policy, regardless of the intent of the parties, the law assuming absolutely that under no circumstances can such a transaction be upheld against them; 4 that the creditors of the equitable owner of property have a right to hold it for their payment.⁵ So if, in pursuance of an arrangement with a judgment-debtor, a third person purchases the land of the former at an execution-sale, in order to hold it for the debtor's benefit and screen it from his creditors, other creditors may treat the sheriff's conveyance to such third person as invalid against them, and may sell the land under their executions.6 They will not be bound by any estoppel which would prevent the grantor from avoiding his deed.7 Any sale or transfer made by a person in debt, in order to be regarded as bonâ fide and valid against his creditors, must be made without the reservation of a trust for the grantor, either open or con-

 2 Hadley v. Hood, 94 Ind. 119. So if the mortgage has been foreclosed. Walsh v. Carrene, 36 La. An. 199.

¹ Hubbard v. Turn, 2 McLean, C. C., 519; Hunt v. Blodgett, 17 Ill. 583; Brown v. Niles, 16 Ill. 385; Merry v. Bostwick, 13 Ill. 398; Barker v. Dayton, 28 Wisc, 367; Pulliam v. Taylor, 50 Miss. 551; Gallman v. Purrie, 47 Miss. 131.

 $^{^3}$ Lukins v. Aird, 6 Wallace 78; Giddings v. Sears, 115 Mass. 505; Banfield v. Whipple, 14 Allen 13; Coolidge v. Melvin, 42 N. H. 510; Stokes v. Jones, 18 Ala. 734; Tennessee Bank v. Ebbert, 9 Heisk. 153.

⁴ Catlin v. Currier, 1 Sawyer, C. C., 7; Burton v. Mill, 78 Va. 468; Bentz v. Rockey, 69 Penn. St. 71; Doyle v. Smith, 1 Coldw. 15; Mitchell v. Sawyer, 115 Ill. 650; Clark v. Robbins, 8 Kans. 574.

⁵ United States v. Griswold, 8 Fed. Rep. 556; Marston v. Marston, 54 Me. 476; M'Lane v. Johnson, 43 Vt. 48; Livermore v. Boutelle, 11 Gray 217; Curtis v. Leavitt, 15 N. Y. 9; Kane v. Roberts, 40 Md. 590; Hunters v. Waite, 3 Grattan 26; Jones v. King, 86 Ill. 225.

⁶ Woodley v. Hassell, 94 Nor. Car. 157; Forrest v. Camp, 16 Ala. 642.

 $^{^7}$ Stokes v. Jones, 21 Ala. 731; Multnomah Railway Co. v. Harris, 13 Oregon 198.

cealed. Secret trusts or open agreements to reconvey the granted premises, to allow the grantor to receive the whole or part of the proceeds thereof, to pay certain of his debts, or to do other things for his benefit, will tend to indicate a fraudulent intent as against his creditors.² Sales, transfers, or assignments of personal property or of choses in action made with a fraudulent intent against creditors are equally invalid against them with conveyances of real estate:3 they are alike utterly void as to creditors except for the protection of bonâ fide purchasers for value.4 A conditional as well as an absolute sale may likewise be fraudulent and void as against creditors.⁵ A judgment and execution or attachment, obtained without real consideration by collusion and designed and used by means of a prior levy to defraud and defeat other creditors, will be invalid as against them.6 Although the validity of a sale or transfer is determined at the moment of its execution according to the intent of the parties to the transaction,7 yet both the subsequent disposition of the proceeds and the prior acts of the parties will often be material to show what that intent was.8 A reconveyance to the wife or children of the grantor will throw doubt upon the validity of the original conveyance.9 If the transactions between the parties lead to the conclusion that there was an intent to defraud creditors,

- 1 Coolidge v. Melvin, 42 N. H. 510; Towle v. Hoit, 14 Id. 61; Mackason's Appeal, 42 Penn. St. 330; Partridge v. Stokes, 44 How. Pr. 381; Allaire v. Day, 30 N. J. Eq. 231.
- ² Gordon v. Reynolds, 114 Ill. 118; Severin v. Rueckerick, 62 Wisc. 1; Smith v. Conkwright, 28 Minn. 23; Platt v. Brown, 16 Pick. 553.
- ⁸ Drake v. Rice, 130 Mass. 410; Beckwith v. Burrough, 14 R. I. 366; Cooke v. Cooke, 43 Md. 522; Burton v. Farinhold, 86 Nor. Car. 260; Smit v. People, 15 Mich. 497.
- ⁴ Heroy v. Kerr, 2 Abbott N. Y. App. Dec. 359; Dorn v. Bayer, 16 Md. 144; Williams v. Banks, 11 Md. 198; McDowell v. Goldsmith, 6 Md. 319; Hall v. Heydon, 41 Ala. 242; Hathaway v. Brown, 18 Minn. 414; Diefendorf v. Oliver, 8 Kans. 365.
- ⁵ Gifford v. Ford, 5 Vt. 532. See Merrill v. Rinker, 1 Baldwin 528; Blood v. Palmer, 11 Maine 414; Ayer v. Bartlett, 6 Pick. 71; Armington v. Houston, 38 Vt. 448; Thompson v. Paret, 94 Penn. St. 275; Ketchum v. Watson, 24 Ill. 592.
- ⁶ Palmer v. Martindell, 43 N. J. Eq. 90; Shallcross v. Deats, 43 N. J. L. 177; Matthews v. Warne, 11 Id. 295; Miles v. Lewis, 115 Penn. St. 580; Snyder v. Kunkleman, 3 Pen. & W. 487; Harding v. Harding, 25 Vt. 487; Whipple v. Foot, 2 Johns. 418; Bloomingdale v. Stein, 42 Ohio St. 168.
- ⁷ Harden v. Wagner, 22 W. Va. 356; Rose v. Colter, 76 Ind. 590; Weller v. Wayland, 17 Johns, 102.
 - ⁸ Orven v. Arvis, 26 N. J L. 22; Painter v. Drum, 40 Penn. St. 467.
 - ⁹ Hatcher v. Crews, 78 Va. 460; Munson v. Arnold, 55 Mich. 134.

the latter may set aside the conveyance as void against them.¹ But since every man possesses absolute power over his own property, he may make any disposition of it which does not interfere with the existing rights of others; and such disposition, if it be fair and real, will be valid,² even, if it be made bond fide, though it may have the effect to delay or defeat his creditors.³ No man's creditors can reasonably complain of his transfer to the real owner thereof of property which, though standing in his name, really and honestly belongs to the grantee, who might in equity have compelled the conveyance.⁴

The circumstances from which the existence of fraud may be inferred are usually spoken of as badges of fraud, and these it is proposed presently to consider in some detail. A preliminary question, and one upon which there has been great diversity of judicial opinion, is as to the conclusiveness of all or any of these badges, and how far and in what cases a conveyance is to be pronounced fraudulent per se as matter of law, and when the question of the actual existence of a fraudulent intent must be submitted to a jury and determined as a fact. It is believed that the rule now supported by the great weight of authority is that, while there may be some cases in which the form of the conveyance and the stipulations of the contracting parties are so obviously illegal in character and purpose as to make it the duty of the courts to pronounce them fraudulent in law, and wholly ineffectual, by yet in general, wherever the terms of a contract are by possibility compatible with good faith, and have upon their face the essential elements of a legal contract, the question of fraudulent intent and want of good

¹ Smith v. Parker, 41 Me. 452; Bryant v. Mansfield, 22 Me. 360; Bowman v. Houdlette, 18 Me. 245; Arthur v. Commercial Bank, 9 Sm. & M. 394; Bray v. Hussey, 24 Ind. 228; Ruffing v. Tilton, 12 Ind. 259; Pennington v. Clifton, 11 Ind. 162.

² Sexton v. Wheaton, 8 Wheaton 229; Seymour v. Wilson, 19 N. Y. 417; Campbell v. Colorado Coal Co., 9 Col. 60.

 $^{^3}$ True v. Congdon, 44 N. H. 48; Pope v. Wilson, 7 Ala. 690; Davis v. Turner, 4 Grattan 422; Spence v. Dunlap, 6 Lea 457.

⁴ Breeze v. Brooks, 71 Cal. 169; Erwin v. Holderman, 92 Mo. 333.

⁵ As in the case of a deed which merely places the legal title in the grantee, leaving the full control and power of disposition in the grantor as equitable owner. Catlin v. Currier, 1 Sawyer, C. C., 7; Bentz v. Rockey, 69 Penn. St. 71; Burton v. Mill, 78 Va. 468; Doyle v. Smith, 1 Coldw. 15; Tennessee Bank v. Ebbert, 9 Heisk. 153; Severin v. Rucckerick, 62 Wisc. 1; Clark v. Robbins, 8 Kansas 574; Smith v. Conkwright, 28 Minn. 23; Harmon v. Hoskins, 56 Miss. 142.

faith must be passed upon as a fact. All the supposed badges of fraud arising from the form of the conveyance and the stipulations in favor of the vendor which tend to raise a presumption of fraud are to be considered. But they will be open to explanation, and may be shown to be consistent with honesty of purpose and good faith in the parties to the contract.2 It is the fraudulent intent that avoids the deed; 3 in the absence of such intent, any conveyance which is good against the maker is good against his creditors who have not acquired a lien upon the very property conveyed.4 There are indeed many cases which hold that the court will as matter of law declare a conveyance which upon its face appears to be for the use of the maker to be absolutely void as against his creditors, 5 just as it would refuse effect to a bond conditioned to do any unlawful act; and it may be admitted that the law will declare any instrument which contains provisions that are not reconcilable with an honest or legal intent to be void upon its face, because no evidence can change its character.6 But in all other cases where property is transferred with the alleged intent of hindering or defrauding creditors, this intent cannot be conclusively assumed by the law, but must be determined by the jury upon all the circumstances of the case.7 And this fraud-

¹ Jarvis v. Banta, 83 Ind. 528; Lockwood v. Harding, 79 Ind. 129; Jenners v. Doe, 9 Ind. 461; Marden v. Babcock, 2 Met. 99; Stewart v. Wilson, 42 Penn. St. 450; Peck v. Carmichael, 9 Yerger 325; Middleton v. Hoff, 15 Mo. 415; Kuykendall v. McDonald, Id. 416; Stewart v. English, 6 Ind. 176; Matthews v. Rice, 31 N. Y. 457; Hooser v. Hunt, 65 Wisc. 71.

² Stevens v. Robinson, 72 Me. 381; Woodman v. Clay, 59 N. H. 53; Austin v. A. & W. Sprague Co., 14 R. I. 464; Spence v. Dunlap, 6 Lea 457; Creed v. Lancaster Bank, 1 Ohio St. 1; Reich v. Reich, 26 Minn. 97; Dewey, J., in Jones v. Huggeford, 3 Met. 515, 517.

⁸ Lucas v. Claflin, 76 Va. 269; Stix v. Sadler, 109 Ind. 254; Miller v. Lewis, 4 N. Y. 554; Burgert v. Borchert, 59 Mo. 80; Nicol v. Crittenden, 55 Ga. 497; Stokes v. Jones, 18 Ala. 734; Bogard v. Gardley, 4 Sm. & M. 302; Harris v. Burns, 50 Cal. 140.

⁴ Allen v. Cowan, 23 N. Y. 502; Payne v. Stanton, 59 Mo. 158.

⁵ Lesel v. Glaser, 32 Kans. 546; Armstrong v. Tuttle, 34 Mo. 432; Johnson v. McAllister, 30 Mo. 327; Billingsby v. Bunce, 28 Mo. 547; Stanley v. Bunce, 27 Mo. 269; Zeigler v. Maddox, 26 Mo. 575; Walter v. Wimer, 24 Mo. 63; Robinson v. Robards, 15 Mo. 459.

⁶ Smith v. Parker, 41 Me. 452; Bryant v. Mansfield, 22 Me. 360; Bowman v. Houdlette, 18 Me. 245; Wise v. Tripp, 13 Me. 9; Blood v. Palmer, 11 Me. 414; Freeman v. Burnham, 36 Conn. 469; Green v. Treiber, 3 Md. 11; Sturdivant v. Davis, 9 Ired. Law 365; Foster v. Woodfin, 11 Id. 339; Johnson v. Thweatt, 18 Ala. 741; Pope v. Wilson, 7 Ala. 690; Chophard v. Bayard, 4 Minn. 533.

⁷ Jewell v. Knight, 123 U. S. 426; Smith v. Craft, Id. 436; Norris v. McCanna,

ulent intent must be shown by sufficient evidence; its existence cannot be presumed. It is not to be lightly inferred from slight evidence or from equivocal circumstances, but should be clearly made out.2 There are, however, many cases in which the existence of a fraudulent intent is held to be merely a question of law, necessarily to be inferred from certain badges of fraud, such as a gift by an insolvent debtor, the absence of a transmutation of possession, and similar circumstances,3 it being assumed that such acts carry with them irresistible evidence of fraud, and must therefore be declared to be fraudulent without regard to the real motive of the parties; 4 but as has been pointed out by more than one judge the application of this rule has often compelled courts to pronounce transactions fraudulent against creditors which were known to be perfectly fair and bona fide, and neither intended nor calculated to delay, hinder, or defraud creditors; 5 and it is the tendency of modern

29 Fed. Rep. 757; Winchester v. Charter, 102 Mass. 272; Williams v. Lord, 75 Va. 390; Nicol v. Crittenden, 55 Ga. 497; Lewis v. Rice, 61 Mich. 98; Oliver v. Eaton, 7 Mich. 108; Geere v. Murray, 6 Minn. 305; Connelly v. Edgerton, 22 Neb. 82; Davis v. Scott, Id. 154; Hartman v. Vogel, 41 Mo. 570; Bigelow v. Stringer, 40 Mo. 195; Cason v. Murray, 15 Mo. 378.

 1 Strauss v. Abrahams, 32 Fed. Rep. 310; Remington Paper Co. v. O'Dougherty, 36 Hun. 79; Mead v. Conroe, 113 Penn. St. 220; Painter v. Drum, 40 Id. 467; Shontz v. Brown, 27 Penn. St. 123; Mulock v. Mulock, 32 N. J. Eq. 348; Quill v. Wolfe, 4 Mackey 188; Bush v. Sherman, 80 Ill. 160; Stout v. Oliver, 40 Ill. 245; Pennington v. Flock, 93 Ind. 378; Minneapolis Mill v. Jamison, 63 Iowa 506; Wolf v. Chandler, 58 Id. 569; Lyman v. Cessford, 15 Id. 329; Long v. West, 31 Kans. 298; Dallam v. Renshaw, 26 Mo. 533; Hempstead v. Johnston, 18 Ark. 123; Weisiger v. Chisholm, 28 Tex. 780; Bridgeford v. Simonds, 18 La. An. 121.

² Jones v. Emery, 40 N. H. 348; Parkhurst v. McGraw, 24 Miss. 134; Pence v. Croan, 51 Ind. 336; Hyde v. Chapman, 33 Wisc. 391; Baldwin v. Buckland, 11 Mich. 389; Pogodzinski v. Kruger, 44 Mich. 79; Allen v. Wegstein, 69 Iowa 598.

³ Lukins v. Aird, 6 Wallace 78; Barnes v. Vetterlein, 16 Fed. Rep. 218, 759; Collinson v. Jackson, 14 Id. 305; Babcock v. Eckler, 24 N. Y. 623; Buckley v. Duff, 114 Penn. St. 596; Hatcher v. Crews, 78 Va. 460; Cothran v. Forsyth, 68 Ga. 560; Doak v. Runyan, 33 Mich. 75; Ewing v. Gray, 12 Ind. 64; Power v. Alston, 93 Ill. 587; Brady v. Briscoe, 2 J. J. Marsh 212; Marshall v. Croom, 60 Ala. 121; Harman v. Hoskins, 56 Miss. 142; Bigelow v. Stringer, 40 Mo. 195.

⁴ German Bank v. Nunes, 80 Ky. 334; Williams v. Osborne, 95 Ind. 347; Williamson v. Wachenheim, 58 Iowa 277; Bohannon v. Combs, 79 Mo. 305; Potter v. McDowell, 31 Mo. 62; Shattuck v. Knight, 25 W. Va. 590; Bay v. Cook, 31 Ill. 336; Rhines v. Phelps, 8 Ill. 455; McBroom v. Rives, 1 Stewart 72; Reeves v. Sherwood, 45 Ark. 520; Bentz v. Riley, 69 Penn St. 71; Beasley v. Bray, 98 Nor. Car. 266; Hodges v. Lassiter, 96 Nor. Car. 351; Burton v. Farinhold, 86 Nor. Car. 260.

⁵ Cabell, J., in Davis v. Turner, 4 Gratt. 422; Dickinson, Sen., in Stoddard v. Butler, 20 Wend. 507; Cole v. White, 26 Wend. 511; Hugus v. Robinson, 24 Penn. St. 9; Brett v. Carter, 2 Lowell 458.

decisions to hold that the real intention of the parties should be determined as a question of fact rather than conclusively settled as a question of law. But the verdict of a jury may be set aside, if against the weight of evidence, on this as on any other question of fact.²

Retention of possession of property sold is commonly regarded as a strong badge of fraud; for posession is primâ facie evidence of ownership,3 and any concealment is a suspicious circumstance.4 The decisions upon the question how far and how conclusively the vendor's retention of possession and control is evidence of fraud are widely variant, and somewhat affected also by the statutes in each State, so that it will be easier to treat the States in detail. But the rule most usually adopted, and that which seems to rest upon the soundest basis of reason, is that this retention of possession is an indication of a fraudulent intent to delay and defeat creditors, to be considered by the jury with the other circumstances of the case.⁵ So the creditors of one to whom a bailment is honestly made cannot claim that his possession, though it may raise a presumption, is conclusive evidence of property in him.⁶ A sale of chattels in the possession of a third person is good against the vendor's creditors without any actual change

¹ Van Meter v. Estill, 78 Ky. 456; Enders v. Williams, 1 Met. (Ky.) 346, 352; Schmidt v. Nunan, 63 Cal. 371; Cheatham v. Hawkins, 76 Nor. Car. 335; Burdsall v. Waggoner, 4 Col. 256; Thomas v. Mackay, 3 Col. 390; Towne v. Fiske, 127 Mass. 125; Patten v. Clark, 5 Pick. 5; Craver v. Miller, 65 Penn. St. 456; Leach v. Shanty, 5 Pa. Law Jour. 28; Hedman v. Anderson, 6 Neb. 392; Gere v. Murray, 6 Minn. 305; McDermott v. Barnum, 16 Mo. 114; Crawford v. Kirksey, 50 Ala. 590; Frow v. Smith, 10 Ala. 571; Scott v. Alford, 53 Tex. 82; Kerr v. Hutchins, 46 Tex. 384.

² Marston v. Vultee, 12 Abbott Pr. 143; Vance v. Phillips, 6 Hill 433; Moore v. Hinnant, 89 Nor. Car. 455; Burr v. Clement, 9 Col. 1; Dodd v. McCraw, 8 Ark. 83; Edwards v. Currier, 43 Me. 474.

⁸ Crawford v. Kimbrough, 76 Ga. 299; Davis v. Turner, 4 Gratt. 422; Dempsey v. Gardiner, 127 Mass. 381; Griswold v. Sheldon, 4 N. Y. 580; The Romp, Olcott (Adm.), 196; Hamilton v. Russell, 1 Cranch 309.

 $^{^4}$ Hoffer v. Gladden, 75 Ga. 532; Evans v. Laughton, 69 Wisc. 138; Goldsby v. Johnson, 82 Mo. 602.

⁵ See Callan v. Statham, 23 Howard 477; Warner v. Norton, 20 Howard 448; Conard v. Atlantic Ins. Co., 1 Peters 386; Means v. Montgomery, 23 Fed. Rep. 421; Wells v. Langbein, 20 Id. 183; Argall v. Seymour, 4 McCrary, C. C., 55; Middleton v. Sinclair, 5 Cranch, C. C., 409; Knowles' Case, 2 Id. 576.

⁶ Rowe v. Sharp, 51 Penn. St. 26; Faulkner v. Waters, 11 Pick. 473; Archer v. McFall, 1 Rice 73; Dreyer v. Durand, 80 Ill. 561; Haynes v. Ledyard, 33 Mich. 319.

of the custody; 1 so, too, where delivery and removal are for the time impracticable.2

In Alabama, the vendor's retention of possession affords some evidence of fraud, which however is not conclusive, and must be passed upon by the jury,³ and will be overthrown if the transaction is found to have been made in good faith and without any secret trust in favor of the vendor.⁴ If unexplained and coupled with other suspicious circumstances, it will become a decisive indication of fraud.⁵ When the possession of the vendor is consistent with the deed, as in case of a mortgage or a conveyance in trust for the payment of debts, it is not a badge of fraud, but will become such, though open to explanation, if protracted after default.⁶ After a bonâ fide public sale, it is not regarded as a badge of fraud.⁷ The vendor's possession of real estate after an absolute sale will not of itself raise a presumption of fraud, but is a circumstance to be considered and passed upon.⁸

In Arkansas, the retention of possession by a vendor or mortgagor raises a presumption of fraud, and throws the burden of sustaining the transaction upon the purchaser or mortgagee; but this presumption is one of fact only, and not conclusive. Coupled with other badges of fraud and unexplained, it will become conclusive. 10

In California, it is provided by the Civil Code, § 3440, that a sale of goods and chattels in the possession or under the con-

 $^{^1}$ Campbell v. Hamilton, 63 Iowa 293; Wing v. Peabody, 57 Vt. 19; Worley v. Watson, 20 Mo. Ap. 304.

² Kleinschmidt v. McAndrews, 117 U. S. 282; Kingsley v. White, 57 Vt. 565; Tognini v. Kyle, 17 Nev. 209.

³ Danner Land & Lumber Co. v. Stonewall Ins. Co., 77 Ala. 184; Croker v. Shropshire, 59 Ala. 542; Mayer v. Clark, 40 Ala. 259; Millard v. Hall, 24 Ala. 209; Noble v. Coleman, 16 Ala. 77.

 $^{^4}$ Shealy v. Edwards, 73 Ala. 175; Bolling v. Jones, 67 Ala. 508; Crawford v. Kirksey, 55 Ala. 282 and 50 Ala. 590; Moog v. Benedicks, 49 Ala. 512.

 $^{^5}$ Seaman v. Nolen, 68 Ala. 463; Marriott v. Givens, 8 Ala. 694; Norris v. Bradford, 4 Ala. 203.

 $^{^6}$ Sandlin v. Anderson, 82 Ala. 330; S. C., 76 Ala. 403; Raviseis v. Aleton, 5 Ala. 297.

⁷ Wyatt v. Stewart, 34 Ala. 716; Simerson v. Decatur Bank, 12 Ala. 205.

⁸ Danner Land & Lumber Co. v. Stonewall Ins. Co., 77 Ala. 184; Noble v. Coleman, 16 Ala. 77.

⁹ Martin v. Ogden, 41 Ark. 186; George v. Norris, 23 Ark. 121; Humphries v. McCraw, 9 Ark. 91; Dodd v. McCraw, 8 Ark. 83; Field v. Simcoe, 7 Ark. 269; Cocke v. Chapman, Id. 197.

¹⁰ Ringgold v. Waggoner, 14 Ark. 69; Merrill v. Dawson, Hempst. 563.

trol of the vendor, without an immediate delivery and actual and continued change of possession, is conclusively presumed to be fraudulent. The purchaser's possession must be actual, open, unequivocal, and continued.¹ A concurrent possession by vendor and purchaser is insufficient.² Whether there has been sufficient change of possession must ordinarily be determined by the jury.³ A full assumption of control by the purchaser, with the assent of a bailee who has the actual possession, is sufficient.⁴ In sheriff's sales and transfers of real estate, the former owner's retention of possession is merely evidence of fraud requiring to be answered.⁵ But the statute does not apply to the sale of an evidence of debt or title, like a chattel mortgage,⁶ and requires a change of possession only against creditors and subsequent purchasers and the vendor's personal representatives.⁷

In Colorado, under a similar statute, the same rule prevails as in California.⁸

In Connecticut, the absence of a change of possession after a sale of personal property raises a conclusive presumption of fraud, not to be overcome by evidence of the actual good faith of the transaction. But the vendor may hold as the agent or bailee of the purchaser, or concurrently with him in case of cotenancy; 10 and the jury must pass upon the character and extent of the change or retention of possession. It is sufficient, unless there is actual fraud, if the purchaser obtains

- Merrill v. Hurlburt, 63 Cal. 494; Edwards v. Sonoma Bank, 59 Cal. 148; Davis v. Drew, 58 Cal. 152; Stephens v. Halstead, Id. 193; Williams v. Lerch, 56 Cal. 330; Parks v. Barney, 55 Cal. 239; Grum v. Barney, Id. 254; Woods v. Bugbey, 29 Cal. 466; Ford v. Chambers, 28 Cal. 13; Goodchaux v. Malford, 26 Cal. 323; Lay v. Neville, 25 Cal. 552; Hodgkins v. Hook, 23 Cal. 581; Weil v. Paul, 22 Cal. 492; Engles v. Marshall, 19 Cal. 320; Stevens v. Irwin, 15 Cal. 503.
 - ² Dean v. Walkenhorst, 64 Cal. 78; Regli v. McClure, 47 Cal. 612.
 - 8 Hesthal v. Myles, 53 Cal. 623.
 - ⁴ Morgan v. Miller, 62 Cal. 492.
 - ⁵ O'Brien v. Chamberlain, 50 Cal. 285; Purkitt v. Polack, 17 Cal. 327.
 - ⁶ Hall v. Redding, 13 Cal. 214.
 - ⁷ Kelly v. Murphy, 70 Cal. 560; Paige v. O'Neal, 12 Cal. 483.
 - ⁸ Cook v. Mann, 6 Col. 21; McCraw v. Welch, 2 Col. 284.
- ⁹ Hull v. Sigsworth, 48 Conn. 258; Elmer v. Welch, 47 Conn. 56; Smith v. Skeary, Id. 47; Mead v. Noyes, 44 Conn. 487; Seymour v. O'Keefe, Id. 128; Capron v. Porter, 43 Conn. 383; Hatstat v. Blakeslee, 41 Conn. 301; Hall v. Gaylor, 37 Conn. 550; Norton v. Doolittle, 32 Conn. 405; Potter v. Mather, 24 Conn. 551; Kirtland v. Snow, 20 Conn. 23; Crouch v. Carrier, 16 Conn. 505.
 - Webster v. Peck, 31 Conn. 495; Lake v. Morris, 30 Conn. 201.
 - ¹¹ Hull v. Hull, 48 Conn. 250; Talcott v. Wilcox, 9 Conn. 134.

possession before the action of any creditor. And this inference of fraud will not arise upon a conveyance of real estate.

In Delaware, the sale or pledge of chattels without a change of possession is void against creditors.³

In Florida, fraud is to be inferred from the vendor's retention of chattels after a sale, unless the evidence not only negatives the fraud, but explains the possession. The presumption of fraud in such a case will outweigh positive testimony of the absence of any fraudulent intent.⁴

In Georgia, the vendor's continued possession of either real or personal property after an absolute sale, either public or private or on legal process, is *primâ facie* evidence of fraud; ⁵ but this presumption must be passed upon by the jury, ⁶ and may be rebutted by proof that a valuable consideration was paid. ⁷

In Illinois, the owner of personal property may not sell it and continue in possession; ⁸ his retention of possession, unless consistent with the conveyance and except in the case of judicial sales, ⁹ is fraudulent *per se*, and will avoid the transaction as to creditors and subsequent purchasers; his retention of chattels after an absolute sale will have the same effect though expressly authorized by the bill of sale. ¹⁰ If one who has sold out his business to another is employed by the purchaser and put in charge of the business as a clerk, this circumstance will create a strong presumption of fraud; ¹¹ but in such a case, or if the property is after delivery returned to the vendor for a temporary purpose, the presumption will not be conclusive and

- ¹ Gilbert v. Decker, 53 Conn. 401.
- ² Tibbals v. Jacobs, 31 Conn. 428.
- 3 Taylor v. Richardson, 4 Houst. 300 ; Bowman v. Herring, 4 Har. 458 ; Perry v. Foster, 3 Har. 293.
 - ⁴ Smith v. Hines, 10 Fla. 258; Gibson v. Love, 4 Fla. 217.
- ⁵ Smith v. McDonald, 25 Ga. 377; Perkins v. Patten, 10 Ga. 241; Carter v. Stanfield, 8 Ga. 49; Beers v. Dawson, Id. 556; Peck v. Land, 2 Ga. 1.
 - ⁶ Johnson v. Lovelace, 51 Ga. 18.
 - ⁷ Scott v. Winship, 20 Ga. 429; Goodwyn v. Goodwyn, Id. 600.
 - ⁸ Green v. Van Buskirk, 38 How. Pr. (N. Y.) 52.
 - 9 Hanford v. Obrecht, 49 Ill. 146.
- Rozier v. Williams, 92 Ill. 187; Greenebaum v. Wheeler, 90 Ill. 296, 298;
 Young v. Bradley, 68 Ill. 553; Bay v. Cook, 31 Ill. 336; Ketchum v. Watson, 24
 Ill. 591; Dexter v. Parkins, 22 Ill. 143; Thompson v. Yeck, 21 Ill. 73; Davis v. Ransom, 18 Ill. 396; Rhines v. Phelps, 8 Ill. 455.
 - ¹¹ Rothgerber v. Gough, 52 Ill. 436.

may be overcome by evidence of good faith.¹ But the mere fact that the delivery was insufficient against creditors will not authorize a finding that the vendor has committed an actual fraud upon them.² Where complete delivery is impossible, as in case of a sale of growing crops, its absence does not indicate fraud.³ In a transfer of real estate, the absence of a change of possession is a highly suspicious circumstance, sufficient if joined with other badges of fraud and unexplained to avoid the conveyance.⁴

In Indiana, the vendor's retention of personal property after a sale does not of itself make the transfer fraudulent. It is merely presumptive evidence of fraud, and may be overcome by proof of good faith in the transaction.⁵ Proof that the grantor of real estate remained in possession after the sale is not sufficient to justify a finding that the sale was fraudulent.⁶

In Iowa, the Code, § 1923, requires either an actual change of possession of personal property sold or mortgaged, or the execution and recording of a written instrument of conveyance: with the registration, there need be no change of possession; without it, the purchaser's possession must be actual, notorious, and exclusive, irrespective of the good faith of the parties. But the statute does not apply to property which is, at the time of the sale, and remains, in the possession of a bailee.

In Kansas, the vendor's retention of possession of chattels after a sale or mortgage is merely a badge of fraud, amounting to *primâ facie* evidence, but to be controlled by proof of good

 $^{^1}$ Wright v. Grover, 27 Ill. 426 ; Brown v. Riley, 22 Ill. 45 ; Warner v. Carlton, Id. 415 ; Powers v. Green, 14 Ill. 386.

² Schwabacker v. Rush, 81 Ill. 310.

³ Ticknor v. McClelland, 84 Ill. 471; Thompson v. Wilhite, 81 Ill. 356.

⁴ Swift v. Lee, 65 Ill. 336; Monell v. Scherrick, 54 Ill. 269.

 $^{^5}$ McFadden v. Fritz, 90 Ind. 590 ; Powell v. Stickney, 88 Ind. 310 ; Rose v. Colter, 76 Ind. 590 ; Kane v. Drake, 27 Ind. 29 ; New Albany Ins. Co. v. Wilcoxson, 21 Ind. 355 ; Blystone v. Burgett, 10 Ind. 28 ; Nutter v. Harris, 9 Ind. 88.

⁶ Pennington v. Flock, 93 Ind. 378.

⁷ See Meyer v. Evans, 66 Iowa 179; Deare v. Needles, 65 Iowa 101; Searing v. Berry, 58 Iowa 20; Jordan v. Lendrum, 55 Iowa 478; Sexton v. Graham, 53 Iowa 181; Smith v. Champney, 50 Iowa 174; McKay v. Clapp, 47 Iowa 418; Sutton v. Ballou, 46 Iowa 517; Boothby v. Brown, 40 Iowa 104; Hesser v. Wilson, 36 Iowa 152; Prather v. Parker, 24 Iowa 26; Blake v. Graves, 18 Iowa 312; Suiter v. Turner, 10 Iowa 517; Kuhn v. Graves, 9 Iowa 303.

 $^{^8}$ Case v. Burrows, 54 Iowa 679; Hickock v. Buel, 51 Iowa 655; Thomas v. Hillhouse, 17 Iowa 67.

faith, and must be passed upon by the jury. But it is a badge of fraud, from which with other circumstances the jury may infer an actual fraudulent intent.²

In Kentucky, it is held that a bill of sale made by one who continues in possession is *per se* fraudulent and void as to creditors and subsequent purchasers.³ But the court has not always been satisfied with this sweeping rule,⁴ and has refused to extend it to sales of growing crops,⁵ or to judicial sales of chattels, or to transfers of real estate, in both of which cases the absence of a change of possession is regarded only as a suspicious circumstance.⁶

In Louisiana, the fact that chattels have been left in the possession of the vendor is *primâ facie* evidence of fraud, which may be rebutted and overcome by evidence of the fairness of the transaction.⁷ In case of a sale of real estate, especially if involuntary, the suspicion is weaker.⁸

In Maine, the vendor's retention of possession tends *primâ* facie to show fraud in the sale; but it is not conclusive, and the jury must determine the good faith of the transaction.⁹

In Maryland, either a record as prescribed by statute or an actual delivery of possession will render a sale or mortgage of personal property valid as to third persons.¹⁰ The vendor's retention of possession is merely *primâ facie* evidence of fraud.¹¹

- 1 Denny v. Faulkner, $22\,$ Kans. 89; Frankhauser v. Ellett, Id. 127; Wolfley v. Rising, 8 Kans. 297.
 - ² Roberts v. Radeliff, 35 Kans. 502.
- ³ Foster v. Grigsby, 1 Bush 86; Jarvis v. Davis, 14 B. Mon. 529; Waller v. Cralle, 8 Id. 11; Hildeburn v. Brown, 17 Id. 779; Green v. Botts, 3 Id. 196.
 - ⁴ Enders v. Williams, 1 Met. 346, 352; Daniel v. Morrison, 6 Dana 182.
- 5 Morton v. Ragan, 5 Bush 334 ; Cummins v. Griggs, 2 Duv. 87 ; Robbins v. Oldham, 1 Duv. 28.
 - ⁶ Miles v. Edelen, 1 Duv. 270; Short v. Tinsley, 1 Met. 397.
- Nicolopulo v. Creditors, 37 La. An. 472; Devonshire v. Gauthreaux, 32 Id. 1132; Spivey v. Wilson, 31 Id. 653; Richardson v. Cramer, 28 Id. 357; Keller v. Blanchard, 19 Id. 53; Miltenberger v. Parker, 17 Id. 254; Bachemin v. Chaperon, 15 Id. 4; Zacharie v. Kirk, 14 Id. 433; Lassiter v. Bussey, 14 Id. 699; Jorda v. Lewis, 1 Id. 59.
 - 8 Porche v. Labatut, 33 I.a. An. 544; Parmer v. Mangham, 31 Id. 348.
- 9 Shaw v. Wilshire, 65 Me. 485; McKee v. Garcelon, 60 Me. 165; Fairfield Bridge Co. v. Nye, Id. 372; Bethel Steam Mill Co. v. Brown, 57 Me. 9; Googins v. Gilmore, 47 Me. 9; Bartlett v. Blake, 37 Me. 124; Cutter v. Copeland, 18 Me. 127.
- 10 Kreuzer v. Cooney, 45 Md. 582 ; Price v. Pitzer, 44 Md. 521 ; Thompson v. Baltimore & Ohio R. Co., 28 Md. 396 ; Bruce v. Smith, 3 H. & J. 499.
 - ¹¹ Hudson v. Warner, 2 Har. & G. 415.

In Massachusetts, the vendor's unexplained possession of chattels after a sale is prima facie evidence tending to show fraud, but may be explained; and the jury must upon all the evidence determine the good or bad faith of the transaction. The party who alleges fraud must prove it; and badges of fraud, though the jury may act upon them, are not necessarily conclusive. The same rule applies to the vendor's continued possession of real estate. Though the purchaser of a chattel not only leaves it in the possession of his vendor, but promises also to conceal the fact of his purchase, yet this is not of itself a fraud which will avoid the sale as to the vendor's creditors; it is only evidence tending to show fraud, strong indeed, but still open to explanation.

In Michigan, likewise, such continued possession by the former owner is merely *primâ facie* evidence of fraud upon creditors, open to explanation and not conclusive.⁴

In Minnesota, registration of bills of sale of chattels is provided for by statute (1878, p. 543; c. 43, tit. III., § 15); unless there is such registration, the vendor's retention of possession is *primâ facie* evidence of fraud, but open to explanation and not conclusive.⁵

In Mississippi, the vendor's continued possession is a badge of fraud, primâ facie avoiding the sale if unexplained, but raising only a presumption of fact capable of being rebutted.⁶ The presumption is strengthened, and may become conclusive, by the concurrence of other badges of fraud,⁷ but is weaker

¹ Towne v. Fiske, 127 Mass. 125; Sleeper v. Chapman, 121 Mass. 404; Folsom v. Clemence, 111 Mass. 273; Ingalls v. Herrick, 108 Mass. 351; Emmons v. Westfield Bank, 97 Mass. 230; Hardy v. Potter, 10 Gray 89; Allen v. Wheeler, 4 Gray 123; Fletcher v. Willard, 14 Pick. 464; Macomber v. Parker, Id. 497; Adams v. Wheeler, 10 Pick. 199; Glover v. Austin, 6 Pick. 209; Ayer v. Bartlett, Id. 71; Wheeler v. Train, 3 Pick. 255; Holmes v. Crane, 2 Pick. 607; Brooks v. Powers, 15 Mass. 244; Allen v. Smith, 10 Mass. 308.

² Chase v. Horton, 143 Mass. 118.

³ Gould v. Ward, 4 Pick. 104.

⁴ See Hills v. Stockwell Furniture Co., 23 Fed. Rep. 432; Edwards v. Edwards, 54 Mich. 347; Waite v. Mathews, 50 Mich. 392; Webster v. Bailey, 40 Mich. 641; Hatch v. Fowler, 28 Mich. 205; Bragg v. Jerome, 7 Mich. 145; Jackson v. Dean, 1 Doug. 519.

Weston v. Sumner, 31 Minn. 456; Camp v. Thompson, 25 Minn. 175; Benton v. Snyder, 22 Minn. 247; Blackman v. Wheaton, 13 Minn. 326.

⁶ Ketchum v. Brennan, 53 Miss. 596; Hilliard v. Cagle, 46 Miss. 309; Coppage v. Barnett, 34 Miss. 621; Bullitt v. Taylor, Id. 708; Wooten v. Clark, 23 Miss. 75; Comstock v. Rayford, 20 Miss. 369.

Wolf v. Kahn, 62 Miss. 814; Harmon v. Hoskins, 56 Miss. 142; Hunt v.

in the case of public forced sales under executions or deeds of trust.¹

In Missouri, the original rule that the vendor's continued possession was not fraud *per se*, but only presumptive evidence of it,² has been so modified by statute as to make the presumption conclusive,³ where the goods are under the control of the vendor ⁴ within the State.⁵ This rule is not applied to assignments.⁶ In transfers of lands, the vendor's continued possession is merely a circumstance indicative of fraud.⁷

In Montana, while actual delivery and change of possession are requisite,⁸ the question is ordinarily one for the jury. If immediate delivery was impracticable, the sale will not be avoided by a day's delay, or by the fact that the purchaser employed the vendor to take care of the property.⁹

In Nebraska, a sale of chattels is *primâ facie* fraudulent if the vendor retains possession; but the presumption is not conclusive, and may be overthrown by evidence of good faith. The burden is on the parties who claim under the sale, the presumption holding good until it is rebutted.

In Nevada, the absence of an immediate delivery and an actual and continued change of possession of chattels in the possession or under the control of the vendor is conclusive evidence of fraud against creditors and subsequent purchasers.¹²

Knox, 34 Miss. 655; Johnston v. Dick, 27 Miss. 277; Roach v. Deering, 9 Sm. & M. 316.

 1 Garland v. Chambers, 11 Sm. & M. 337; Stovall v. Farmers' Bank, 8 Id. 305.

 2 State v. Evans, 38 Mo. 150; State v. Rosenfeld, 35 Mo. 472; McDermott v. Barnum, 16 Mo. 114; Kuykendall v. McDonald, 15 Mo. 416.

³ Allen v. Massey, 17 Wallace 351; Stewart v. Nelson, 79 Mo. 522; Wright v. McCormick, 67 Mo. 426; Burgert v. Borchert, 59 Mo. 80; Bishop v. O'Connell, 56 Mo. 158; Leesom v. Heniford, 44 Mo. 323; Claffin v. Rosenberg, 42 Mo. 439.

 4 Crane v. Timberlake, 81 Mo. 431; How v. Taylor, 52 Mo. 592; Criley v. Vasel, Id. 445.

- ⁵ Smith v. Hutchings, 30 Mo. 380.
- ⁶ Scofield v. Burkett, 90 Mo. 465.
- ⁷ King v. Moon, 42 Mo. 551; Steward v. Thomas, 35 Mo. 202.
- ⁸ Botcher v. Berry, 6 Mont. 448; Helena Bank v. McAndrews, 5 Mont. 325.
- ⁹ O'Gara v. Lowry, 5 Mont. 427.
- 10 Chicago Lumber Co. r. Fisher, 18 Neb. 334; Severance r. Leavitt, 16 Neb. 439; Densmore r. Tomer, 14 Neb. 392 and 11 Neb. 118; Miller v. Morgan, 11 Neb. 121; Uhl v. Robison, 8 Neb. 272; Robison v. Uhl, 6 Neb. 328.
 - ¹¹ Marsh v. Burley, 13 Neb. 261; Morgan v. Bogue, 7 Neb. 429.
- 12 Wilson v. Hill, 17 Nev. 401; Conway v. Edwards, 6 Nev. 190; Doak v. Brubaker, 1 Nev. 218.

In New Hampshire, the vendor's retention of possession is *primâ facie* evidence of a secret trust for his benefit which will avoid the sale; ¹ and from the absence of explanation satisfactory to the court, joined with other suspicious circumstances, fraud against creditors will be conclusively inferred.²

In New Jersey, although there is an early decision to the contrary, the rule now is that the vendor's continued possession is not conclusive, but open to explanation. But it is a badge of fraud.

In New York, it is provided by statute (3 Rev. Stats. 7th Ed., p. 2328, pt. II., c. VII., tit. 2, §5) that every sale of goods and chattels, where the vendor retains possession, "shall be presumed to be fraudulent and void," as against creditors or subsequent purchasers, "and shall be conclusive evidence of fraud," unless it shall be shown that the sale "was made in good faith and without any intent to defraud such creditors or purchasers." After many variant decisions,6 the rule is now settled under this statute that the sale is presumably fraudulent and void where the vendor remains in possession; but this presumption is open to explanation, and the sale will be upheld if it is shown affirmatively to have been made in good faith and without any intention of defrauding creditors. The purchaser's want of possession raises a presumption of fraud; and the burden of proof to rebut this presumption is on the party who maintains the validity of the sale.7 The same rule

¹ Parker v. Marvell, 60 N. H. 30. But not for the benefit of a creditor who knowingly derives an advantage from the sale: Parsons v. Hatch, 63 N. H. 343.

² Towne v. Rice, 59 N. H. 412; Plaisted v. Holmes, 58 N. H. 293, 619; Sumner v. Dalton, Id. 295; Flagg v. Pierce, Id. 348; Stowe v. Taft, Id. 445; Crawford v. Forristall, 57 N. H. 102 and 58 N. H. 114; Cutting v. Jackson, 56 N. H. 253; Lang v. Stockwell, 55 N. H. 561; Shaw v. Thompson, 43 N. H. 130; Coolidge v. Melvin, 42 N. H. 510; Page v. Carpenter, 10 N. H. 77.

⁸ Chuma v. Wood, 6 N. J. L. 155.

Martin Safe Co. v. Norton, 48 N. J. L. 410; Parr v. Brady, 37 Id. 201; Miller v. Pancoast, 29 Id. 250.
 Embury v. Klemm, 30 N. J. Eq. 517.

⁶ Tifft v. Barton, 4 Denio 171; Butler v. Van Wyck, 1 Hill 438; White v. Cole, 24 Wend. 116; Smith v. Acker, 23 Wend. 653; Stoddard v. Butler, 20 Wend. 507; Stevens v. Fisher, 19 Wend. 181; Randall v. Cook, 17 Wend. 53; Doane v. Eddy, 16 Wend. 523; Collins v. Brush, 9 Wend. 198; Hall v. Tuttle, 8 Wend. 375; Divver v. McLaughlin, 2 Wend. 596; Cram v. Mitchell, 1 Sandf. Ch. 251; Ludlow v. Hurd, 19 Johns. 221; Sturtevant v. Bullard, 9 Johns. 337; McInstry v. Tanner, Id. 135; Van Buskirk v. Warren, 34 Barb. 457; Merritt v. Lyon, 3 Barb. 110; Randall v. Parker, 3 Sandf. 69; Lee v. Huntoon, 1 Hoffman 447; Danforth v. Woods, 11 Paige 9; Butler v. Stoddard, 7 Paige 163.

⁷ Steele v. Benham, 84 N. Y 634; Mumper v. Rushmore, 79 N. Y. 19; Blaut

is applied to judicial sales.¹ The presumption is much weaker in cases of transfers of lands.² But the purchaser cannot defend against the vendor's creditors on the ground that the vendor had retained possession.³

In North Carolina, the lack of delivery of possession of goods transferred is *primâ facie* evidence of an intent to defraud creditors, but not conclusive, and is open to explanation by proof of the good faith of the transaction.⁴

In Ohio, it is simply *primâ facie* evidence of fraud, open to explanation, and to be passed upon by the jury.⁵

In Oregon, the presumption of fraud arising from the vendor's retention of personal property sold ⁶ may be rebutted by proof of good faith, and the question is for the jury.⁷

In Pennsylvania, if a delivery and change of possession was practicable, and the vendor has without any fair and honest reason retained possession, such retention is a fraud in law. But an actual removal of the property is not always necessary.⁸ If there is any conflict of testimony, or if the property has passed under the control of the purchaser, the jury must ascertain whether the latter's assumption of control was bonâ fide or merely colorable, to determine its validity.⁹ In case of

- 1 Stimson v. Wrigley, 86 N. Y. 332; Gardenier v. Tubbs, 21 Wend. 169; Fonda v. Gross, 15 Wend. 628; Whipple v. Foot, 2 Johns. 418.
 - ² Every v. Edgerton, 7 Wend. 259.
 - ³ James Goold Co. v. Maheady, 38 Hun 294.
- 4 Boone v. Hardie, 83 Nor. Car. 470; Holmes v. Marshall, 78 Id. 262; State v. Bethune, 8 Ired. Law 139; Rea v. Alexander, 5 Id. 644.
- ⁵ Thorne v. First National Bank, 37 Ohio St. 254; Collins v. Myers, 16 Ohio 547; Hombeck v. Van Metre, 9 Ohio 153; Barr v. Hatch, 3 Ohio 527; Rogers v. Dare, Wright 136; Edgington v. Williams, Id. 439; Starr v. Starr, 1 Ohio 321.
 - ⁶ Monroe v. Hussey, 1 Ore. 188.
 ⁷ McCully v. Schwackhamer, 6 Ore. 438.
 - ⁸ McClure v. Forney, 107 Penn. St. 414; Ziegler v. Handrick, 106 Id. 87.
- ⁹ Buckley v. Duff, 114 Penn. St. 596; Crawford v. Davis, 99 Id. 576; Barr v. Boyles, 96 Id. 31; Dougherty v. Haggerty, 96 Id. 515; Parks v. Smith, 94 Id. 46; Pearson v. Carter, 94 Id. 156; Thompson v. Paret, 94 Id. 275; Bismarck Bdg. Assn. v. Bolster, 92 Id. 123; Maynes v. Atwater, 88 Id. 496; Bond v. Bronson. 80 Id. 360; Worman v. Kramer, 73 Id. 378; Garman v. Cooper, 72 Id. 32; Bentz v. Rockey, 69 Id. 71; Miller v. Garman, 69 Id. 134; McKibbin v. Martin, 64 Id.

v. Gabler, 77 N. Y. 461; Husted v. Ingraham, 75 N. Y. 251; Burnham v. Brennam, 74 N. Y. 597; Southard v. Benner, 72 N. Y. 424; May v. Walter, 56 N. Y. 8; Tilson v. Terwilliger, Id. 273; Mitchell v. West, 55 N. Y. 107; Miller v. Lockwood, 32 N. Y. 293; Ball v. Loomis, 29 N. Y. 412; Adams v. Davidson, 10 N. Y. 309; Thompson v. Blanchard, 4 N. Y. 303; Butler v. Miller, 1 N. Y. 496; McClune v. Cain, 3 Abbott N. Y. Ap. Dec. 76; Niagara Bank v. Lord, 33 Hun. 557; Knight v. Forward, 63 Barb. 311; Terry v. Butler, 43 Barb. 395; Pine v. Rikert. 21 Barb. 469.

judicial sales a change of possession is not imperative. In absolute sales of real estate the vendor's retention of possession is not of itself presumptive evidence of fraud, but is a circumstance to be submitted to the jury.

In Rhode Island, the vendor's retention of personal property after a sale is, as against his creditors, presumptive but not conclusive evidence of fraud.³

In South Carolina, the vendor's continued possession after an absolute sale or gift of personal property, but not after a mortgage, is a badge of fraud, conclusive if unexplained, but not necessarily fraudulent.⁴ But this presumption of fraud does not arise in respect of property sold at a sheriff's sale.⁵ If property is transferred to a creditor in payment of an existing debt, an actual change of possession was absolutely required by the earlier decisions; ⁶ but the general rule has recently been extended to this case also.⁷

In Tennessee, the vendor's retention of possession is a badge of fraud, but not conclusive. The burden of proof is upon the purchaser to show that the transaction was bonû fide as against creditors.⁸ This presumption will be much strength-

352; Haak v. Linderman, 64 Id. 499; Barr v. Reitz, 53 Id. 256; Dewart v. Clement, 48 Id. 413; Brawn v. Keller, 43 Id. 104; Baltimore R. Co. v. Hoge, 34 Id. 214; Milne v. Henry, 40 Id. 352; Born v. Shaw, 29 Id. 288; Haynes v. Hunsicker, 26 Id. 58; Dunlap v. Bournonville, 26 Id. 72; Hugus v. Robinson, 24 Id. 9; Dick v. Lindsay, 2 Grant Cas. 431; McBride v. McClelland, 6 Watts & S. 94; Young v. McClure, 2 Id. 47; Clow v. Woods, 5 S. & R. 275, and cases there cited.

Bisbing v. Third National Bank, 93 Penn. St. 79; Smith v. Crisman, 91 Id.
 428; Craig's Appeal, 77 Id. 448.
 Allentown Bank v. Beck, 49 Penn. St. 394.

 3 Mead v. Gardiner, 13 R. I. 257; Beckwith v. Burrough, Id. 294; Goodell v. Fairbrother, 12 R. I. 233; Sarle v. Arnold, 7 R. I. 582; Anthony v. Wheatons, Id. 490.

- ⁴ Werts v. Spearman, 22 S. C. 200; Lott v. De Graffenreid, 10 Rich. Eq. 346; Footman v. Pendergrass, 3 Id. 33; Gist v. Pressly, 2 Hill Eq. 318; Belk v. Massey, 11 Rich. Law 614; Garrett v. Rhame, 9 Id. 407. In the early cases of Kennedy v. Ross, 2 Mills 125, and De Bardleben v. Beekman, 1 Desaus. 346, the presumption was made conclusive as a matter of law.
- ⁵ Guignard v. Aldrich, 10 Rich. Eq. 253; Coleman v. Hamburg Bank, 2 Strobh. Eq. 285.
- ⁶ Fulmore v. Burroughs, 2 Rich. Eq. 95; Jones v. Blake, 2 Hill Eq. 629; Anderson v. Fuller, 1 McMull. Ch. 27; Smith v. Henry, 1 Hill Law 16.
 - ⁷ Pregnall v. Miller, 21 S. C. 385; Nelson v. Good, 20 S. C. 223.
- 8 Carney v. Carney, 7 Baxter 284; Grubbs v. Greer, 5 Coldw. 160; Carny v. Palmer, 2 Id. 35; Desport v. Metcalf, 3 Head 424; Gaugh v. Henderson, 2 Id. 628; Wilde v. Rawlings, 1 Id. 34; Neuffer v. Pardue, 3 Sneed 191; Gunn v. Mason, 2 Id. 637; Sugg v. Tillman, 2 Swan 208; Smith v. Greer, 3 Humph. 118; Maney v. Killough, 7 Yerg. 440; Young v. Pate, 4 Id. 164; Callen v. Thompson, 3 Id. 475; Darwin v. Handley, 3 Id. 502.

ened by other concurrent circumstances, but does not arise upon a purchase by a stranger at a judicial sale.²

In Texas, the possession of personal property raises the presumption of ownership until the contrary appears; the vendor's retention of possession is not fraud, per se, but only presumptive evidence of it, and must be passed upon by the jury.³ In sales of real estate, it is not presumptive evidence of fraud, but a circumstance to be submitted to the jury.⁴

In Utah, though the statute requires as against creditors that a mortgage of chattels must be accompanied by delivery and followed by an actual and continued change of possession, yet it is held that the mortgagee's retention of the mortgagor in his employ with charge of the property, though a badge of fraud, is not conclusive evidence thereof.⁵

In Vermont, a substantial and visible change of possession of property sold is required as against the vendor's creditors. The purchaser must acquire the open, notorious, and exclusive possession; and the vendor must be wholly, and not merely partially, divested of the use, possession, and enjoyment thereof.⁶ If there is any evidence tending to show such a change of possession, it must be submitted to the jury; otherwise, the question will be settled by the court as a matter of law.⁷ A concurrent possession by vendor and purchaser, like what would be held by joint tenants, will render the sale fraudulent and void against the vendor's creditors.⁸

In Virginia, it was the earlier rule that an absolute sale of chattels unaccompanied by possession was *per se* fraudulent and void as against the vendor's creditors; ⁹ but the later de-

¹ Grannis v. Smith, 3 Humph. 179. ² Floyd v. Goodwin, 8 Yerg. 484.

³ Scott v. Alford, 53 Tex. 82; Thornton v. Tandy, 39 Tex. 544; Van Hook v. Walton, 28 Tex. 59; Stadtler v. Wood, 24 Tex. 622; Converse v. McKee, 14 Tex. 20; Earle v. Thomas, Id. 583; McQuinnay v. Hitchcock, 8 Tex. 33.

⁴ Hancock v. Haron, 15 Tex. 507.

⁵ Ewing v. Merkley, 3 Utah 406.

⁶ Weeks v. Preston, 53 Vt. 57; Rothchild v. Rowe, 44 Vt. 389; Houston v. Howard, 39 Vt. 54; Hart v. Farmers' Bank, 33 Vt. 252; Parker v. Kendrick, 29 Vt. 388.

 $^{^7}$ Allen v. Knowlton, 47 Vt. 512; White v. Miller, 46 Vt. 65; Burrows v. Stebbins, 26 Vt. 659.

 $^{^8}$ Mills v. Warner, 19 Vt. 609; Hall v. Parsons, 17 Vt. 271; Wilson v. Hooper, 12 Vt. 653.

⁹ Mason v. Bond, 9 Leigh 181; Lewis v. Adams, 6 Id. 320; Shields v. Anderson, 3 Id. 729; Tavenner v. Robinson, 2 Rob. 280; Glasscock v. Batton, 6 Rand. 78; Claytor v. Anthony, 6 Rand 285; Land. v. Jeffries, 5 Rand 211; Robertson v. Ewell, 3 Munf. 1; Alexander v. Deneale, 2 Munf. 341.

cisions treat it as merely *primâ facie* evidence of fraud, to be considered by the jury, though conclusive unless explained.¹

In West Virginia, it is held that the vendor's retention of possession may or may not be fraudulent as against his creditors, according to the circumstances of the transaction.²

In Wisconsin, the lack of an actual and continued change of possession is not fraudulent *per se*, but is presumptive evidence of fraud,³ which will avoid the sale unless controlled by evidence of actual good faith in the transaction.⁴ But this presumption will not arise upon a sale of choses in action.⁵

The insolvency of the vendor of real or personal property is of itself a badge of fraud.⁶ It has been said to be a presumption that the sale by an insolvent debtor of all his property is fraudulent, on the ground that the necessary effect of such a sale must be to hinder and delay his creditors.⁷ But this presumption, if it exists, may be rebutted; ⁸ for in many cases such a sale will indicate good faith and an honest desire in the vendor to appropriate his property to the discharge of his debts.⁹ Indeed, fraud cannot safely be inferred from the mere fact of the vendor's insolvency.¹⁰ If a transfer by an insolvent debtor is

- Wray v. Davenport, 79 Va. 19; Sipe v. Earman, 26 Gratt. 563; Curd v. Miller,
 Id. 185; Forkner v. Stuart, 6 Id. 197; Davis v. Turner, 4 Id. 422; Kevan v.
 Branch, 1 Id. 274; Howard v. Prince, 11 N. B. R. 322.
 - ² Klee v. Reitzenberger, 23 W. Va. 749.
 - ³ Manufacturers' Bank v. Rugee, 59 Wisc. 221.
- ⁴ Rice v. Jerenson, 54 Wisc. 248; Lord v. Devendorf, Id. 491; Wheeler v. Konst, 46 Wisc. 398; Blakeslee v. Rossman, 43 Id. 116; Osen v. Sherman, 27 Id. 501; Bullis v. Borden, 21 Id. 136; Mayer v. Webster, 18 Id. 393; Grant v. Lewis, 14 Id. 487; Smith v. Welch, 10 Id. 91; Gleason v. Day, 9 Id. 498; Whitney v. Brunette, 3 Id. 621.
 - ⁵ Livingston v. Littell, 15 Wisc. 218.
- 6 State v. Morse, 27 Fed. Rep. 261; Johnson v. Lovelace, 51 Ga. 18; Triplett v. Graham, 58 Iowa 135; Roberts v. Radcliff, 35 Kans. 502; Rothell v. Grimes, 22 Neb. 526; Merrill v. Lock, 41 N. H. 486; Wheeler v. Brady, 4 Thomp. & C. 547; Keyser v. Angle, 40 N. J. Eq. 481; Helfrich v. Stern, 17 Penn. St. 143; Seligson v. Brown, 61 Tex. 180.
- ⁷ Tredwell v. Graham, 88 Nor. Car. 208; Seaman v. Nolen, 68 Ala. 463; Wiley v. Knight, 27 Ala. 336; Ringgold v. Waggoner, 14 Ark. 69; Geisendorff v. Eagles, 106 Ind. 38; Searing v. Berry, 58 Iowa 20; Demarest v. Terhune, 18 N. J. Eq. 532; Walcott v. Almy, 6 McLean, C. C., 23.
- ⁸ Rice v. Jerenson, 54 Wisc. 248; Lord v. Devendorf, Id. 491; Crawford v. Kirksey, 50 Ala. 590; Clark v. Wise, 39 How. Pr. 97; Churchill v. Wells, 7 Coldw. 364; Ocoee Bank v. Nelson, 1 Coldw. 186; Scott v. Alford, 53 Tex. 82.
- ⁹ French v. Reel, 70 Iowa 122; Lewis v. Rice, 61 Mich. 97; Ruhl v. Phillips, 48 N. Y. 125; Loeschigk v. Bridge, 42 N. Y. 421; S. C. 42 Barb. 171.
 - ¹⁰ Lininger v. Herron, 18 Neb. 450; Leffel v. Schermerhorn, 13 Neb. 342;

shown to be coupled with a secret trust for his own benefit, the presumption of fraud is strengthened, and may even become conclusive; 1 so if the conveyance is made to a member of the debtor's family, or to one in confidential relations with him,2 or by an absconding debtor, sespecially if no consideration is paid or secured,4 or if the asserted consideration is shown to be fictitious or is not supported by proof, or if the conveyance is for a grossly inadequate consideration,6 or upon an unusual term of credit,7 or if any other suspicious circumstances concur.8 And although the grantor's indebtedness at the time of making even a voluntary conveyance is, according to the best-reasoned authorities, merely an argument of fraud, not of itself sufficient in favor of creditors to vacate a conveyance,9 and such a conveyance cannot be avoided unless it is shown that his debts are so large in proportion to his property as to render their payment doubtful, 10 still, if he is so indebted, the conveyance will

Muirheid v. Smith, 35 N. J. Eq. 303; Ballard v. Eckman, 20 Fla. 661; Beasley v. Bray, 98 Nor. Car. 266; Bishop v. Jones, 28 Kans. 680; Bowden v. Bowden, 75 Ill. 143; Thornton v. Lane, 11 Ga. 459; Eastman v. McAlpin, 1 Ga. 157; Cameron v. Scudder, Id. 204; Wooters v. Osborn, 77 Ind. 513; Allen v. Kennedy, 49 Wisc. 549; Pecot v. Armelin, 21 La. An. 667.

¹ Power v. Alston, 93 Ill. 587; Mitchell v. Stetson, 64 Ga. 442; Shannon v. Commonwealth, 8 Serg. & R. 444; Bryant v. Young, 21 Ala. 264; West v. Snodgrass, 17 Ala. 549.

² Thomas r. Beck, 39 Conn. 241; Wheeler r. Brady, 4 Thomp. & C. 547; McCanless v. Flinchum, 89 Nor. Car. 373; Tredwell r. Graham, 88 Id. 208; Black v. Caldwell, 4 Jones Law 150; Pryor v. Lemon, 67 Ala. 458; Renney r. Williams, 89 Mo. 139; Triplett v. Graham, 58 Iowa 135; Golloer v. Martin, 33 Kans. 252; Slattery v. Stewart, 45 Ill. 293.

³ Danjean v. Blacketer, 13 La. An. 595.

⁴ Searing v. Berry, 58 Iowa 20; Roberts v. Radcliff, 35 Kans. 502; Ringgold v. Waggoner, 14 Ark. 69; Gregg v. Lee, 37 La. An. 164.

⁵ Earnshaw r. Stewart, 64 Md. 513; Anderson r. Anderson, 80 Ky. 638; Pryor r. Lemon, 67 Ala. 458; Johnson r. Lovelace, 51 Ga. 18; Hendricks r. Robinson, 2 Johns. Ch. 283 and 17 Johns. 438; Haney r. Nugent, 13 Wisc. 283.

⁶ Keyser v. Angle, 40 N. J. Eq. 481; Clinton Bank v. Cummins, 38 Id. 191; Seaman v. Nolen, 68 Ala. 463; Stern Auction Co. v. Mason, 16 Mo. Ap. 473.

⁷ Thames v. Rambert, 63 Ala. 561; Robinson v. Frankel, 85 Tenn. (1 Picklet 475; Walton v. Birch, 10 La. An. 100; Beck v. Brady, 7 Id. 124.

 8 Kempner r. Churchill, 8 Wallace 362; Thames r. Rambert, 63 Ala. 561; Browning r. Hart, 6 Barb. 91; Bailey r. Burton, 8 Wend. 339; Sands r. Codwise, 4 Johns. 536.

⁹ Winchester v. Charter, 12 Allen 606; Clayton v. Brown, 17 Ga. 217; Colby v. Peabody, 52 N. Y. Superior Ct. 394; Dardenne v. Hardwick, 9 Ark. 482; Smith v. Yell, 8 Ark. 470.

¹⁰ Carr v. Breese, 81 N. Y. 584; Wilson v. Howser, 12 Penn. St. 109; Dietus v. Fuss, 8 Md. 148; Wilson v. Lott, 5 Fla. 305; Anonymous, 1 Wall, Jr., 107.

readily be set aside as fraudulent, irrespective of his actual intent in making it.2 It is sometimes said that the burden in such a case is thrown upon the grantee to show that the grantor, though indebted, was yet amply able to pay his debts.3 If one who is insolvent or in embarrassed circumstances mortgages his property for a greater sum than is actually due, this fact is primâ facie evidence of fraud upon creditors, but is not enough to avoid conclusively the security for what is actually due.4 Sales and transfers by one heavily indebted are, as against his creditors, regarded with some suspicion.⁵ If the alleged vendor remains in undisturbed enjoyment of the property without any explanation; 6 if the consideration is inadequate, or has been so paid as to facilitate its concealment from creditors; if the alleged consideration was a mere pretence; if all the circumstances taken together show that the object of the debtor and of the purchaser was to deprive the former's creditors of their resort upon his property, then the creditors may avoid the transfer as fraudulent against them.⁷ But although a person is in debt, he may still sell his property to whom he pleases, if no lien exists thereon to prevent a sale, and if his transaction is an honest one.8 Insolvency, the concealment of property, the ap-

¹ Lowry v. Fisher, 2 Bush 70; Rucker v. Abell, 8 B. Mon. 566.

 2 Goodman v. Wineland, 61 Md. 449; Richardson v. Rhodes, 14 Rich. 95; Hudnal v. Wilder, 4 McCord 294; Eigleberger v. Kebler, 1 Hill Eq. 113; Hamilton v. Hamilton, 2 Rich. Eq. 355.

³ Ellinger v. Crowl, 17 Md. 361; Matthews v. Torinus, 22 Minn. 132.

⁴ United States v. Griswold, 7 Sawyer, C. C., 296; Willison v. Desenburg, 41 Mich. 156; Lombard v. Dows, 66 Iowa 243; Wood v. Scott, 55 Iowa 114. It was held conclusive in Butts v. Peacock, 23 Wisc. 359.

⁵ See McCorkle v. Hammond, 2 Jones Law 444; Chappel v. Clapp, 29 Iowa 161; Blodgett v. Chaplin, 48 Me. 322; Dunlap v. Haynes, 4 Heisk. 476; Metropolitan Bank v. Durant, 22 N. J. Eq. 35; Woodson v. Pol, 19 Mo. 340; Hudgins v. Kemp, 20 Howard 45.

⁶ Johnston v. Dick, 27 Miss. 277; Williams v. Lowndes, 1 Hall 579.

⁷ Click v. Green, 77 Va. 827; Blaut v. Gabler, 77 N. Y. 461; St. Johns Bank v. Tyler, 55 Mich. 297; Smith v. Smith, 11 N. H. 459; Booher v. Worrell, 57 Ga. 235; Hightower v. Mustian, 8 Ga. 506; Barrow v. Bailey, 5 Fla. 9; Pickett v. Pipkin, 64 Ala. 520; Milner v. Davis, 65 Iowa 265; Grannis v. Smith, 3 Humph. 179; Hunt v. Knox, 34 Miss. 655; Switz v. Bruce, 16 Neb. 463; Dorrington v. Minnick, 15 Id. 397; Purkitt v. Polack, 17 Cal. 327; Kinder v. Macy, 7 Id. 206; Riddell v. Shirley, 5 Id. 488.

⁸ Ziegler v. Handrick, 106 Penn. St. 87; Dunlap v. Bournonville, 26 Id. 72; Green v. Tanner, 8 Met. 411; Miller v. Kirby, 74 Ill. 242; Sigles v. Knox County Bank, 8 Ohio St. 511; Waddams v. Humphrey, 22 Ill. 661; Dougherty v. Cooper, 77 Mo. 528; Rupe v. Alkire, Id. 641; Forrester v. Moore, Id. 651; Erb v. Cole, 31 Ark. 554; King v. Russell, 40 Tex. 124.

propriation thereof to the debtor's own use, and other like circumstances, are evidence of the existence of a fraudulent intent at the time of making any sale or transfer, and the opposite of these conditions and acts, and the application of his means to the discharge of his just obligations, are the appropriate indications of good faith. A conveyance by one against whom a suit is pending or expected is to be judged by like rules. It is not necessarily fraudulent as against the plaintiff in such suit; but the pendency of the suit is a circumstance, and may be a weighty circumstance, to be considered; and if the transfer appears to have been made for the purpose of defeating the collection of the expected judgment, and if the grantee participated in this design or paid no consideration, the conveyance may be avoided, though the action be in tort.

A debtor's transfer of all his property is a badge of fraud; for this is not only an unusual transaction, but takes away the very fund to which his creditors must look for payment. Whether it will raise a violent or only a slight presumption of fraud must be determined by the jury. Fraud was presumed and the conveyance set aside where a voluntary grant to the debtor's wife was very soon followed by a fraudulent disposition of his remaining property; where all his estate was

 $^{^1}$ Bulkley v. Buffington, 5 McLean, C. C., 457; Storm v. Davenport, 1 Sandf. Ch. 135; Smit v. People, 15 Mich. 497; Thompson v. Bickford, 19 Minn. 17; Crapster v. Williams, 21 Kans. 109.

² Mower v. Hanford, 6 Minn. 535; Smith v. Skeary, 47 Conn. 47.

 $^{^3}$ Sipe v. Earman, 26 Gratt. 563; Brown v. Dean, 52 Mich. 267; Barr v. Hatch, 3 Ohio 527.

 $^{^4}$ Gordon v. McIlwain, 82 Ala. 247; Mason v. Pierron, 69 Wisc. 585; Moore v. Roe, 35 N. J. Eq. 90; Redfield Mfg. Co. v. Dysart, 62 Penn. St. 62; Barber v. Terrell, 54 Ga. 146; Leach v. Fowler, 22 Ark. 143.

 $^{^5}$ Lee v. Hunter, 1 Paige 519; Hoboken Savings Bank v. Beckman, 36 N. J. Eq. 83; Randall v. Vroom, 30 Id. 353; Pashby v. Mandego, 42 Mich. 172; Smith v. Brown, 34 Mich. 455; Draper v. Draper, 68 Ill. 18; McSween v. McCown, 23 So. Car. 342; Summers v. Taylor, 80 Ky. 429; Slater v. Sherman, 5 Bush 206; Potter v. Phillips, 44 Iowa 353; Knowlton v. Hawes, 10 Neb. 534; Williams v. Barnett, 52 Tex. 130.

⁶ Johnson v. Wagner, 76 Va. 587; Ford v. Johnson, 14 N. Y. Supreme Ct. (7 Hun) 563; Westmoreland v. Powell, 59 Ga. 256; Langford v. Ely, 7 Humph. 585; Farnsworth v. Bell, 5 Sneed 531; Weir v. Day, 57 Iowa 84.

⁷ Singer v. Jacobs, 3 McCrary, C. C., 638; Hartshorn v. Eames, 31 Me. 93;
Sarle v. Arnold, 7 R. I. 582; Delaware v. Ensign, 21 Barb. 85; Moore v. Roe, 35
N. J. Eq. 90; Hoffer v. Gladden, 75 Ga. 532; Hartman v. Allen, 9 Lea 657;
Dresher v. Corson, 23 Kans. 313.

Angell v. Pickard, 61 Mich. 561; Bigelow v. Doolittle, 36 Wisc. 115; Kerr
 v. Hutchins, 46 Tex. 384.
 9 Benedick v. McGill, 2 McCrary, C. C., 486.

conveyed to his wife or near relatives ¹ or children for an inadequate consideration; ² where it was conveyed for an inadequate consideration with an agreement for his future support; ³ where the sole consideration for an assignment of all his property was future advances to be made to himself; ⁴ where a debtor conveyed all his property hastily to intimate associates of his own in exchange for notes payable to his wife. ⁵ A gift of all a debtor's property within the State where the parties live cannot be upheld by evidence that he had sufficient property in a distant State to meet his debts, especially where he was being pushed by his creditors at the time of the gift. ⁶ But the transfer of all a debtor's property is not necessarily fraudulent, and will be sustained when the facts show that it was made in good faith. ⁷

If a sale or transfer of property is made in secret and kept or attempted to be kept concealed, this is a suspicious circumstance and a badge of fraud.⁸ But it is merely a circumstance to be considered by the jury in connection with the facts in the case showing the real intent of the parties.⁹ Standing by itself, it is not conclusive.¹⁰ Even an agreement on the part of the purchaser to keep the transaction secret, though a strong argument of fraud, will not of itself avoid the sale for the benefit of the grantor's creditors, but is open to explanation.¹¹ But it has been held that an agreement for secrecy or the designed omission to place a deed on record, whereby the grantor was enabled to obtain credit on the faith of his apparent owner-

- 1 Pickett v. Pipkin, 64 Ala. 520; Thomas v. Beck, 39 Conn. 241; Williams v. Barnett, 52 Tex. 130.
 - ² Johnson Harvester Co. v. Cibula, 62 Iowa 697.
 - ³ Egery v. Johnson, 70 Me. 258; Church v. Chapin, 35 Vt. 223.
 - ⁴ Barnum v. Hempstead, 7 Paige 568.
 - ⁵ Deakers v. Temple, 41 Penn. St. 234; Dorrington v. Minnick, 15 Neb. 397.
 - ⁶ Baker v. Lyman, 53 Ga. 339.
 - ⁷ Graves v. Atwood, 52 Conn. 512; Ryan v. Young, 79 Mo. 30.
- ⁸ Callan v. Statham, 23 Howard 477; Warner v. Norton, 20 Howard 448; Allen v. Massey, 2 Abbott U. S. 60; Comley v. Fisher, Taney 121; Brown v. McDonald, 1 Hill Eq. 297; Fishel v. Lockard, 52 Ga. 632; Lasher v. Stafford, 30 Mich. 369; Evans v. Laughton, 69 Wisc. 138; King v. Moon, 42 Mo. 551.
 - 9 Woodman v. Clay, 59 N. H. 53; Lamprey v. Donacour, 58 N. H. 376.
- ¹⁰ Reiger v. Davis, 67 Nor. Car. 185; Hugus v. Robinson, 24 Penn. St. 9; Nicholas v. Higby, 35 Iowa 401; Barnes v. Foxen, 53 Mich. 475; Haven v. Richardson, 5 N. H. 113.
- ¹¹ Danner Land & Lumber Co. v. Stonewall Ins. Co., 77 Ala. 184; Folsom v. Clemence, 111 Mass. 273; Gould v. Ward, 4 Pick. 103 and 5 Id. 291; Hafner v. Irwin, 1 Ired. Law 490.

ship of the property conveyed, is conclusive evidence of fraud upon his creditors ¹ who have no notice of the transaction.² It is usually considered merely an indication of bad faith.³

The giving of a deed of either real or personal property, absolute in form, but intended to operate only as security for a debt, is a mark of fraud; for it is adapted to cover up the grantor's right of redemption from his creditors.⁴ Such a deed is held in Alabama ⁵ and New Hampshire ⁶ to be absolutely void against the grantor's creditors. But it is generally regarded as merely an indication of fraud upon creditors, not conclusive, and to be answered by proof of an honest intention in the transaction; ⁷ if it was really intended by both parties to defeat the grantor's creditors, it will of course be void.⁸

We have already seen that a mortgage given by one who is insolvent or embarrassed to secure a larger sum than is actually due is regarded with vehement suspicion; ⁹ and it is a general rule that such an excess purposely introdued in a mortgage is a circumstance indicating fraud. ¹⁰ It it is intended by both parties to cover up the property from the mortgagor's creditors it may be avoided by such creditors; ¹¹ if it was taken honestly,

² Watt v. Parsons, 73 Ala. 202; Hoagland v. Wilson, 15 Neb. 320.

- ⁴ Gleises v. McHatton, 14 La. An. 560; Jackson v. Brush, 20 Johns, 5.
- ⁵ Sims v. Gaines, 64 Ala. 392; Hartshorn v. Williams, 31 Ala. 149.

⁶ Stratton v. Putney, 63 N. H. 577; Ladd v. Wiggin, 35 Id. 421; Badger v. Story, 16 Id. 168; Smyth v. Carlisle, Id. 464.

8 Moore v. Tarlton, 3 Ala. 444; Barker v. French, 18 Vt. 460.

⁹ Antea, p. 51.

 10 Goff v. Rogers, 71 Ind. 459; Taylor v. Wendling, 66 Iowa 562; Kalk r. Fielding, 50 Wisc. 339; Carr v. Ryan, 2 Wyoming 130.

 $^{^1}$ Hilliard r. Cagle, 46 Miss. 309; Pendleton r. Hughes, 65 Barb. 136; Ramsey v. Voorhees, 38 N. J. Eq. 282.

³ Rice r. Cunningham, 116 Mass. 466; Glasscock r. Batton, 6 Rand. 78; Cowan r. Gill, 11 Lea 674; Goldsby r. Johnson, 82 Mo. 602; Ray v. Teabout, 65 Iowa 157.

⁷ Gaffney v. Signaigo, 1 Dillon, C. C., 158; Thompson v. Pennell, 67 Me.
159; Emmons v. Bradley, 56 Me. 333; Stevens v. Hinckley, 43 Me. 440; Stedman v. Vickery, 42 Me. 132; Oriental Bank v. Haskins, 3 Met. 332; Cutler v. Dickinson, 8 Pick. 386; Smith v. Onion, 19 Vt. 427; Bigelow v. Topliff, 25 Vt. 273; Mead's Appeal, 46 Conn. 417; Rigney v. Talmage, 17 How. Pr. 556; Moore v. Roe, 35 N. J. Eq. 90; Phinizy v. Clark, 62 Ga. 623; Gibson v. Hough, 60 Ga. 588; Mobile Bank v. Tishomingo Savgs. Institution, 62 Miss. 250; Fifield v. Gaston, 12 Iowa 218; Doswell v. Adler, 28 Ark. 82; Ross v. Duggan, 5 Colorado 85; Haseltine v. Espey, 13 Or. 301.

 $^{^{11}}$ Stinson v. Hawkins, 16 Fed. Rep. 850; Smith v. Kenney, 1 Mackey 12; Holt v. Creamer, 34 N. J. Eq. 181; Heintze v. Bentley, Id. 562 and 33 Id. 405: Mitchell v. Sawyer, 115 Ill. 650.

in good faith, and not for the purpose of defrauding any creditor of the mortgagor, it is valid, and can be enforced for the amount actually due.¹ The intention of the parties determines the result; ² so where a mortgage is given to secure a larger sum than the consideration recited.³

How far the license given to the mortgagor of a stock of goods to sell the goods in the usual course of business avoids the mortgage has been hotly disputed. It is contended on the one side that such a power is inconsistent with the nature and character of a bona fide mortgage; that it leaves the disposition of the property entirely to the honesty and good faith of the debtor, and is no security at all as far as he is concerned, but is efficacious only against his creditors; that it leaves the mortgagor the substantial owner of the property, and is therefore fraudulent and void.4 But it is answered that the mortgagor does not have power to dispose of the entire stock of goods absolutely, but merely, by selling in the ordinary course of business, to free small portions of the goods from time to time of the incumbrance of the mortgage; that the creditors of the mortgagor may have notice from the records of the existence and character of the mortgage, and can readily hold any surplus value of the goods; that as a matter of experience and observation such mortgages are no more likely to be fraudulent in fact than any others; that if any creditor is likely to be injured by allowing the debtor thus to dispose of parts of the mortgaged property, it is rather the mortgagee, whose security is thus cut down, than the general creditor, who has no claim upon the specific property.5 It is held that permission given to the mortgagor to deal until a default with the mortgaged goods in the usual course of business

 $^{^1}$ Whittredge v. Edmunds, 63 N. H. 248; Mason v. Franklin, 58 Iowa 506; Minor v. Sheehan, 30 Minn. 419; Beatty v. Dudley, 80 Ky. 381; Colbern v. Robinson, 80 Mo. 541.

 $^{^2}$ See Ford v. Williams, 13 N. Y. 577; Strohm v. Hayes, 70 Ill. 41; Kaysing r. Hughes, 64 Ill. 123; Upton v. Craig, 57 Ill. 257; Carson v. Byers, 67 Iowa 606; Wood v. Scott, 55 Iowa 114; Kalk v. Fielding, 50 Wisc. 339; Hickman v. Perrin, 6 Coldw. 135; Crapster v. Williams, 21 Kans. 109.

³ Mead's Appeal, 46 Conn. 417.

 $^{^4}$ Bump on Fraudulent Conveyances, 3d Ed., 123 et seq.; Jones on Chattel Mortgages, 2d Ed., \S 420 et seq.; Dunning v. Mead, 90 Ill. 376; Robinson v. Elliott, 22 Wallace 513.

 $^{^5}$ Jones on Chattel Mortgages, *ubi supra*. Brett v. Carter, 2 Lowell 458; Lyon v. Council Bluffs Bank, 29 Fed. Rep. 566.

does not necessarily make the mortgage fraudulent and void, but is at most only a badge of fraud, to be considered and passed upon by the jury, in Alabama, Georgia, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Jersey, Rhode Island, and South Carolina. It is held that the mortgagor's control of the property and power to make sales thereof is a conclusive proof of fraud in Colorado, Illinois, Mississippi, Nevada, Gorgon, Tennessee, Kentucky, Washington Territory, West Virginia, and the District of Columbia.

- ¹ But if the mortgager was insolvent or in contemplation of insolvency, and was known by the mortgagee to be embarrassed, this reservation does create a presumption of fraud, which if not repelled by other circumstances will avoid the mortgage. See Owens v. Hobbie, 82 Ala. 466; Benedict v. Renfro, 75 Ala. 121; King v. Kenan, 38 Ala. 63; Price v. Mazange, 31 Ala. 701; Constantine v. Twelves, 29 Ala. 607; Tickner v. Wiswall, 9 Ala. 305.
 - ² Code (1882), § 1954. Goodrich v. Williams, 50 Ga. 425.
- ³ Fisher v. Syfers, 109 Ind. 514; Muncie Bank v. Brown, 112 Ind. 474; Mc-Fadden v. Fritz, 90 Ind. 590 (overruling Mobley v. Letts, 61 Ind. 11); Lockwood v. Harding, 79 Ind. 129; McLoughlin v. Ward, 77 Ind. 383; Overman v. Quick, 8 Biss., C. C., 134.
- 4 Marsh r. Bird, 22 Fed. Rep. 576; Sperry v. Etheridge, 63 Iowa 543; Meyer v. Evans, 66 Iowa 179.
 - ⁵ Ross v. Wilson, 7 Bush 29.
- ⁶ Googins v. Gilmore, 47 Me. 9; Stedman v. Vickery, 42 Me. 132; Brinley v. Spring, 7 Me. 241.
 - ⁷ Hamilton v. Rogers, 8 Md. 301; Rose v. Bevan, 10 Md. 466.
- 8 Blanchard v. Cook, 144 Mass. 207; Fletcher v. Powers, 131 Mass. 333; Cobb v. Farr, 16 Gray 597; Briggs v. Parkman, 2 Met. 258.
- ⁹ People's Bank v. Bates, 120 U. S. 556; Hills v. Stockwell Furniture Co., 23 Fed. Rep. 432; Morse v. Riblet, 22 Id. 501; Wingler v. Sibley, 35 Mich. 231.
 - ¹⁰ Lister v. Simpson, 38 N. J. Eq. 438; Miller v. Shreve, 29 N. J. L. 250.
 - ¹¹ Williams v. Winsor, 12 R. I. 9.
 - ¹² Hirshkind v. Israel, 18 So. Car. 157.
 - ¹³ City Bank v. Goodrich, 3 Col. 139; Wilcox v. Jackson, 7 Col. 521.
- ¹⁴ Greenebaum v. Wheeler, 90 Ill. 296; Dunning v. Mead, Id. 376; Goodheart v. Johnson, 88 Ill. 58; Simmons v. Jenkins, 76 Ill. 479.
 - ¹⁵ Joseph v. Levi, 58 Miss. 843; Harmon v. Hoskins, 56 Miss. 142.
 - ¹⁶ Morrill *in re*, 2 Sawyer, C. C., 356.
- ¹⁷ Jacobs v. Ervin, 9 Ore. 52; Bremer v. Fleckenstein, Id. 266; Catlin v. Currier, 1 Sawyer, C. C., 7.
- ¹⁸ Rome Bank v. Hasleton, 15 Lea 216; McCrasley v. Haslock, 4 Baxter 1; Tennessee Bank v. Ebbert, 9 Heisk, 153.
 - ¹⁹ Texas Bank v. Lovenberg, 63 Tex. 506.
- Wray v. Davenport, 79 Va. 19; Perry v. Shenandoah Bank, 27 Gratt. 755;
 Lang v. Lee, 3 Rand. 410.
 Wineburg v. Schaer, 2 Wash. 328.
 - ²² Clafflin v. Foley, 22 W. Va. 434.
 ²³ Fox v. Davidson, 1 Mackey 102.
- ²⁴ Gauss v. Doyle, 46 Ark. 122; Gauss v. Orr, Id. 129; Lund v. Fletcher, 39 Ark. 325.

of such a license to the mortgagor's will, as between the parties to it, avoid the mortgage as fraudulent as to everything included in the power of sale; but if the language used will admit of the construction that such sales are to be for the mortgagee's benefit, this construction will be adopted and the mortgage sustained. Permission to the mortgagor to sell for the mortgagee's benefit does not avoid the mortgage. Substantially the same rule prevails in Kansas, Minnesota, Missouri, Nebraska, New Hampshire, New York, North Carolina, Ohio, Wisconsin, and Wyoming.

A mortgage of perishable articles, or articles consumable in their use, is not *ipso facto* void, though the reservation of the use to the mortgager is a badge of fraud to be considered by the jury. So a mortgage given to secure future advances may be fraudulent, or may be satisfactorily explained, according to the attendant circumstances. 12

- ¹ Howard v. Rohlfing, 36 Kans. 357; Leser v. Glaser, 32 Kans. 546; Frankhouser v. Ellett, 22 Kans. 12.
- ² Hawkins v. Hastings Bank, 1 Dillon, C. C., 462; Bannon v. Bowles, 34 Minn. 416; Stein v. Munch, 24 Minn. 390; First National Bank v. Anderson, 24 Minn. 435; Horton v. Williams, 21 Minn. 187; Gere v. Murray, 6 Minn. 305.
- 8 Heisey v. Goodwin, 90 Mo. 366; Bullene v. Barrett, 87 Mo. 185; Hewson v. Toote, 72 Mo. 632; Weber v. Armstrong, 70 Mo. 217; Donnell v. Byern, 69 Mo. 468; Metzner v. Graham, 57 Mo. 404.
- ⁴ Davis v. Scott, 22 Neb. 154; Chicago Lumber Co. v. Fisher, 18 Neb. 334; Omaha Book Co. v. Sutherland, 10 Neb. 334; Gregory v. Whedon, 8 Neb. 373.
 - ⁵ Wilson v. Sullivan, 58 N. H. 260; Putnam v. Osgood, 52 N. H. 148.
- 6 Potts v. Hart, 99 N. Y. 168; Brackett v. Harvey, 91 N. Y. 214; Southard v. Benner, 72 N. Y. 424; Miller v. Lockwood, 32 N. Y. 293; Conkling v. Shelley, 28 N. Y. 360.
- ⁷ Boone v. Hardie, 83 N. C. 470. But the presumption of fraud is strong; "almost impossible successfully to insist." Smith, C. J., in Cheatham v. Hawkins, 80 N. C. 161; 76 N. C. 335; Boone v. Hardie, 87 N. C. 72; Holmes v. Marshall, 78 N. C. 262.
- ⁸ Kleine v. Katzenberger, 20 Ohio St. 110; Brown v. Webb, 20 Ohio 389; Harman v. Abbey, 7 Ohio St. 218; Collins v. Myers, 16 Ohio 547.
- ⁹ Knapp v. Deitz, 64 Wisc. 31; Kalk v. Fielding, 50 Wisc. 339; Fisk v. Harshaw, 45 Wisc. 665; Blakeslee v. Rossman, 43 Wisc. 116; Steinart v. Duester, 23 Wisc. 116; Cotton v. Marsh, 3 Wisc. 221.
 - 10 St. 1882, c. 11, § 9.
- ¹¹ Lincoln Savings Bank v. Ewing, 12 Lea 598; Hunter v. Foster, 4 Humph. 211; Robbins v. Parker, 3 Met. 117; Shurtleff v. Willard, 19 Pick. 202; Googins v. Gilmore, 47 Me. 9; Sipe v. Earman, 26 Gratt. 563; Cochran v. Paris, 11 Gratt. 348; Dance v. Seaman, Id. 778; Ewing v. Cargill, 21 Miss. 79; Farmers' Bank v. Douglass, 19 Miss. 469; Potter v. McDowell, 31 Mo. 62; Planters' Bank v. Clarke, 7 Ala. 765.
 - ¹² Lawrence v. Tucker, 23 Howard 14; Wood v. Franks, 67 Cal. 32; Carter v.

The fact that a sale is made upon an unusually long term of credit may properly be considered with other circumstances in determining whether the transaction was intended to defraud the seller's creditors; 1 but it does not necessarily lead to such an inference, though coupled with great value of the property, failure to take security, and present inability of the purchaser to pay.2 So in determining the validity of a mortgage or deed of trust, the time which it has to run is an element to be weighed,3 of more or less importance according to the circumstances of the case.4 The larger the value of the property in proportion to the amount of the debt, and the longer the stay provided for, the more stringent becomes the inference of fraud.⁵ If a mortgage covers an excess of property over the amount of the debt purporting to be secured, this is also a circumstance to be considered; 6 so if a chattel mortgage is given by one greatly indebted to secure a debt already amply secured by a mortgage of land; 7 so if a valuable equity of redemption is made over to the mortgagee without further consideration, either directly or by means of a formal sale.8 But though a large amount of property be pledged for a comparatively small debt, so as to show such inadequacy of consideration as would ordinarily be a strong badge of fraud, yet if the debts are bona fide and the security is fairly given, without the intention of concealing the surplus of the property from the debtor's other creditors, the pledge is valid.9 Delay in the

Rewey, 62 Wisc. 552; Doyle v. Smith, 1 Coldw. 15; Griffin v. Doe, 12 Ala. 783; Summers v. Ross, 43 Miss. 749; Barnard v. Moore, 8 Allen 273; Adams v. Wheeler, 10 Pick. 199; Badlam v. Tucker, 1 Pick. 389; Wilson v. Russell, 13 Md. 494.

- 1 Spaulding v. Adams, 63 Iowa 437; Hughes v. Monty, 24 Iowa 499; Pilling v. Otis, 13 Wisc. 495; Swift v. Lee, 65 Ill. 336; Blodgett v. Chaplin, 48 Me. 322; Downing v. Kelly, 49 Barb. 547; Burt v. Keyes, 1 Flippin, C. C., 61.
 - ² Nicol v. Crittenden, 55 Ga. 497.
- ³ Lewis v. Caperton, 8 Grattan 148; Henderson v. Downing, 24 Miss. 106: Storm v. Davenport, 1 Sanf. Ch. 135.
 - ⁴ Stewart v. Cockrell, 2 Lea 369.
- ⁵ Sandlin v. Robbins, 62 Ala. 477; Roynolds v. Crook, 31 Ala. 634; Hartman v. Allen, 9 Lea 657; Bennett v. Union Bank, 5 Humph. 612; Henderson v. Downing, 24 Miss. 106; Bigelow v. Stringer, 40 Mo. 195; Livesay v. Beard, 22 W. Va. 585; Davis v. Ransom, 18 Ill. 396.
 - ⁶ Hickman v. Perrin, 6 Coldw. 135; Butler v. Stoddard, 7 Paige 163.
 - ⁷ Crapster v. Williams, 21 Kans. 109.
- 8 Wright v. Mack, 95 Ind. 332; Hope v. Valley City Salt Lake Co., 25 W. Va., 789; Ripley v. Severance, 6 Pick. 474.
 - ⁹ George v. Kimball, 24 Pick. 234; Jewett v. Warren, 12 Mass. 300.

enforcement by a creditor of a lien held by him on the debtor's property is a circumstance to be considered in determining the validity of the lien as to other creditors.¹

Gross inadequacy of consideration, as already intimated, is often a strong badge of fraud: 2 If the vendor is largely indebted, and if other suspicious circumstances concur, it may become conclusive, as raising a violent presumption of a secret trust.4 One who for an utterly inadequate consideration and with unseemly haste assigns his interest in the estate of an ancestor will come under this rule.⁵ Where no actual fraud is shown, the purchaser of property for a manifestly inadequate price has been allowed, as against the grantor's creditors, to hold it only as security for the sum actually paid; 6 and protection against the creditors of a fraudulent vendor has been refused to one who has purchased for a grossly inadequate price, though without notice of the seller's fraudulent intent.7 But the smallness of price realized at a sale on judicial process is not of itself evidence of fraud,8 though it is a circumstance to be considered if other badges of fraud appear.9 And mere inadequacy

- 1 Harshaw v. Woodfin, 64 Nor. Car. 568; Feurt v. Rowell, 62 Mo. 524; Galt v. Dibrell, 10 Yerg. 146.
- ² Singer v. Jacobs, 3 McCrary, C. C., 638; Almond v. Gairdner, 76 Ga. 699; Strong v. Lawrence, 58 Iowa 55; Felder v. Harper, 12 Ala. 612; Mahone v. Reeves, 11 Ala. 345; Boyd v. Ellis, 11 Iowa 97; Beebe v. De Baun, 8 Ark. 510; Surget v. Byers, Hempst. 715; Burch v. Smith, 15 Tex. 219.
- ³ Clinton Bank v. Cummins, 38 N. J. Eq. 191; Stevens v. Dillman, 86 Ill. 233; Bay v. Cook, 31 Ill. 336; Delaware v. Ensign, 21 Barb. 85; Ames v. Gilmore, 59 Mo. 537; Wells v. Thomas, 10 Mo. 237; Hamet v. Dundass, 4 Penn. St. 178; Barrow v. Bailey, 5 Fla. 9.
- ⁴ Shelton v. Church, 38 Conn. 416; Sands v. Codwise, 4 Johns. 536; Rhoads v. Blatt, 84 Penn. St. 31; Monell v. Sherrick, 54 Ill. 269; Roach v. Deering, 9 Sm. & M. 316.
 - ⁵ Milner v. Davis, 65 Iowa 265; Gaines v. Russ, 20 Fla. 157.
 - ⁶ Sutherlin v. March, 75 Va. 223; Loring v. Dunning, 16 Fla. 119.
- 7 Galbreath v. Cook, 30 Ark. 417; Jewett v. Cook, 81 Ill. 260; Shultz v. Morgan, 27 La. An. 616.
- 8 Craig's Appeal, 77 Penn. St. 448; American Ins. Co. v. Oakley, 9 Paige 259; Randolph v. Thomas, 23 Ark. 69; Van Dyke v. Martin, 53 Ga. 221; O'Callaghan v. O'Callaghan, 91 Ill. 228; Sowle v. Champion, 16 Ind. 165; Wallace v. Berger, 25 Iowa 456; Cushwa v. Cushwa, 5 Md. 55; Campau v. Godfrey, 18 Mich. 27; Marlatt v. Warwick, 18 N. J. Eq. 108; Smith v. Duncan, 16 Id. 240; Chouteau v. Nuckolls, 20 Mo. 442; Agricultural Association v. Brewster, 51 Tex. 257.
- ⁹ Morris v. Robey, 73 Ill. 462; Thomas v. Hebenstreit, 68 Ill. 115; Seller v. Lingermann, 24 Ind. 264; Lashley v. Cassell, 23 Ind. 600; Williams v. Jones, 1 Bush 621; Cubbage v. Franklin, 62 Mo. 364; Cummins v. Little, 16 N. J. Eq. 48; Smith v. Vreeland, Id. 198; Sheldon v. Saenz, 59 How. Pr. 377; Grede v. Dannenfelser, 42 Wisc. 78; Pearson v. Hudson, 52 Tex. 352.

of consideration is not enough, standing alone, to prove fraud against creditors; 1 it is not an important factor, unless the disparity is great.²

There are many cases which hold that a voluntary conveyance, one wholly unsupported by a valuable consideration, is absolutely void, without any regard to the intent with which it was made, as against existing creditors of the grantor who remain unpaid after the grantor's other property is exhausted; 3 and there can be no doubt that if the grantor intended by the gift to delay or cheat his creditors, the voluntary grantee will not be allowed to hold the property against those creditors.4 Any voluntary conveyance must, in many probable contingencies, put the property beyond the reach of the creditors of the grantor; and accordingly a voluntary conveyance by one largely indebted is regarded as prima facie evidence of an intent to defraud creditors; 5 and it has been held in Alabama and New Hampshire that the burden is on any grantee, as against the creditors of his vendor, to show that he paid a valuable consideration by other evidence than the acknowledgment thereof in his deed.⁶ But it is commonly held that the

¹ Jenkins v. Einstein, 3 Bissell, C. C., 128; Conley v. Bentley, 87 Penn. St. 40; Tebbs v. Lee, 76 Va. 744; Feigley v. Feigley, 7 Md. 537; Stensrud v. Delamater, 56 Mich. 144; Chambers v. Rinkel, 76 Mo. 538; Jamison v. King, 50 Cal. 132; Moore v. Lowery, 27 Tex. 541.

 $^{^2}$ Clark v. Krauss, 2 Mackey 559 ; Barnes v. Foxen, 53 Mich. 475 ; Waterman v. Donalson, 43 Ill. 29.

 $^{^3}$ Wellington v. Fuller, 38 Me. 61; Emery v. Vinal, 26 Me. 295; Early v. Owens, 68 Ala. 171; McAnally v. O'Neal, 56 Ala. 299; Crawford v. Kirksey, 55 Ala. 282; Spencer v. Godwin, 30 Ala. 355; Gannard v. Eslava, 20 Ala. 732; Seamans r. White, 8 Ala. 656; Manhattan Co. v. Evertson, 6 Paige 457; Planters' Bank v. Henderson, 4 Humph. 75; Law v. Smith, 4 Ind. 56; Barhydt v. Perry, 57 Iowa 416; Craig v. Gamble, 5 Fla. 430; Miller v. Desha, 3 Bush 212; Filly v. Register, 4 Minn. 391; Garrison v. Monaghan, 33 Penn. St. 232; Greer v. Baughman, 13 Md. 257; Black v. Sanders, 1 Jones Law 67.

⁴ Spaulding v. Blythe, 73 Ind. 93; Blake v. Sawin, 10 Allen 340; Wise v. Moore, 31 Ga. 148; Matson v. Melchor, 42 Mich. 477; Woody v. Dean, 24 So. Car. 499; Kid v. Mitchell, 1 Nott & McC. 334; Hecks v. Stone, 13 Minn. 434; Martin v. Crosby, 11 Lea 198; Searcey v. Carter, 4 Sneed 271; Wood v. Hunt, 38 Barb. 302; New York R. Co. v. Pyle, 5 Bosw. 587; Brown v. Texas Cactus Hedge Co., 64 Tex. 396; Belt v. Raguet, 27 Tex. 471; Lee v. Figg, 37 Cal. 328.

⁵ Cole v. Tyler, 65 N. Y. 73; Van Wyck v. Seward, 18 Wend. 375, and 6 Paige 62; Stevens v. Robinson, 72 Me. 381; Lewis v. Linscott, 37 Kans. 379.

 $^{^6}$ Zelnicker v. Brigham, 74 Ala. 598 ; Dolin v. Gardner, 15 Ala. 758 ; Prescott v. Hayes, 43 N. H. 593.

mere fact of an existing indebtedness will not render a voluntary conveyance absolutely fraudulent and void in law, even against existing creditors, if there is no actual intention on the part of the grantor to hinder or delay them in the collection of their debts,1 just as the payment of a full price, though a circumstance of great weight, is not conclusive of the absence of fraud; that if he was insolvent or deeply indebted, with property insufficient or barely sufficient to pay his debts, there would be strong presumptive evidence of fraud, sufficient to set aside the conveyance in favor of his creditors; 3 but that a trifling indebtedness of a grantor, who retained under his control property amply sufficient to pay all demands against him, would not be sufficient to avoid even a voluntary conveyance,4 and that fraud cannot be inferred from the mere fact that there is no valuable consideration for the grant,5 though the burden is sometimes thrown upon the voluntary grantee to show affirmatively the honesty and good faith of the transaction.6 The character of the transfer is fixed by the circumstances existing at the time; 7 but the grantor's payment of all his debts existing at the time of his conveyance, or an adequate

² Loudenback v. Foster, 39 Ohio St. 203; Kittering v. Parker, 8 Ind. 44;

Terrell v. Green, 11 Ala. 207.

 4 Winchester v. Charter, 102 Mass. 272; Jackson v. Peek, 4 Wend. 300; Houston v. Bogle, 10 Ired. Law 496; Arnett v. Wanett, 6 Id. 41; Weed v. Davis, 25 Ga. 684; Hudnall v. Teasdall, 1 McCord 227; Burkey v. Self, 4 Sneed 121.

¹ Emmerich v. Hefferan, 53 N. Y. Super. Ct. 98; Worthington v. Bullett, 6 Md. 172; Hamilton v. Greenwood, 1 Bay (So. Car.) 173; Hall v. Edrington, 8 B. Mon. 47; Faloon v. McIntyre, 118 Ill. 292; Koster v. Hiller, 4 Ill. App. 21.

³ Kehr v. Smith, 20 Wallace 31; Jose v. Hewett, 50 Me. 248; Caswell v. Hill, 47 N. H. 407; Everett v. Read, 3 N. H. 55; Manhattan Co. v. Osgood, 15 Johns. 162; Bennett v. McGuire, 58 Barb. 625; Wulton v. Isaacs, 30 Gratt. 726; Harvey v. Steptoe, 17 Gratt. 289; Myers v. King, 42 Md. 65; Shorter v. Methoin, 52 Ga. 225; Hunter v. Hunter, 10 W. Va. 321; Levering v. Nowell, 9 Baxter 177; Willis v. Gattman, 53 Miss. 721; Toulmin v. Buchanan, 1 Stewart 67; White v. McPheeters, 75 Mo. 286.

 $^{^5}$ Genesee River Bank v. Mead, 92 N. Y. 637; Hogan v. Robinson, 94 Ind. 138; Bishop v. State, 83 Ind. 67; Pence v. Croan, 51 Ind. 336; Lerow v. Wilmarth, 9 Allen 382; Pelham v. Aldrich, 8 Gray 515; Lane v. Kingsberry, 11 Mo. 402; McFadden v. Mitchell, 54 Cal. 628.

⁶ Parish v. Murphree, 13 Howard 92; Ellinger v. Crowl, 17 Md. 361; Oliver v. Moore, 23 Ohio St. 473; Cock v. Oakley, 50 Miss. 628; Young v. White, 25 Miss. 146; Blakeney v. Kirkley, 2 Nott & McC. 544; Sears v. Shafer, 1 Barb. 408; Matthews v. Torinus, 22 Minn. 132.

⁷ King r. Thompson, 9 Peters 204; Worthy v. Brady, 91 Nor. Car. 265; Ray r. Simons, 76 Ind. 150; Wood v. Hunt, 38 Barb. 302; Page v. Kendrick, 10 Mich. 300.

provision made by him for their payment, tends to repel the idea that he made it in fraud of his creditors. So, too, the grantor's solvency at the time of the conveyance may well be judged of by the event.2 A conveyance made to one having a paramount claim upon the property is not voluntary, and is valid against the grantor's creditors.3 If a voluntary conveyance made in good faith by one not in debt is afterwards found to be defective, a voluntary confirmatory deed will be good, though the grantor had then become embarrassed.4 Voluntary transfers of partnership real estate to a single partner, so as to lay the foundation of a claim for homestead exemption,5 or by both partners when insolvent,6 a purchase at an execution sale with funds supplied by the debtor,7 a voluntary surrender of notes and other securities,8 if of any value, 9 a conveyance of real estate upon a prospective consideration which has entirely failed, 10 or in consideration simply of the worthless debt of a third party, 11 have all been avoided by the creditors of the grantors. But only the grantor's creditors or subsequent vendees could have avoided these conveyances; 12 nor could they have avoided the voluntary transfer of a thing of no real value; 13 and the voluntary grantee may protect himself by the acquisition of a paramount title. The inclusion in a deed, without any additional consideration, of a piece of land not agreed to be sold is a purely voluntary conveyance. 15 A voluntary conveyance made by way of reasonable settlement upon

 2 Richardson v. Rhodus, 14 Rich. Law 95 ; Wilson v. Buchanan, 7 Gratt. 334; Carlisle v. Rich, 8 N. H. 44.

³ Wagner v. Smith, 13 Lea 560.

4 Gudgel v. Kitterman, 108 Ill. 50. So with the husband's voluntary confirmation of the wife's defective deed, Deutsch v. Allen, 57 Tex. 89.

⁵ Bishop v. Hubbard, 23 Cal. 514.

⁶ Royer Wheel Co. v. Fielding, 61 How. Pr. 437.

⁷ Montgomery v. McGuire, 59 Miss. 193.

- ⁸ Johnson v. Jones, 79 Ind. 141; Petrie v. Wright, 6 Sm. & M. 647.
- ⁹ Hoyt v. Godfrey, 88 N. Y. 669.
- ¹⁰ Wisner v. Farnham, 2 Mich. 472.
- ¹¹ Seymour v. Wilson, 19 N. Y. 417.
- 12 Baker v. McGuire, 37 La. An. 628; Ingals v. Brooks, 29 Vt. 398; Allison v. Bowles, 8 Mo. 346.
 - 18 Williams v. Robbins, 15 Gray 590.
 - ¹⁴ Lamb v. Smith, 132 Mass. 574.
 - ¹⁵ McCandless v. Reynolds, 74 Nor. Car. 301.

¹ Claffin v. Mess, 30 N. J. Eq. 211; Davis v. Herrick, 37 Me. 397; Winchester v. Charter, 97 Mass. 140; Kerrigan v. Rautigan, 43 Conn. 17; Hester v. Wilkinson, 6 Humph. 215.

the wife or a child of the grantor, in consideration solely of blood and affection, is not usually regarded as in itself fraudulent and void as to existing creditors; 1 its character will depend upon the actual or assumed intention of the grantor as gathered from the circumstances of the case.2 The settlement of such an amount of property as materially to impair the grantor's ability to pay his debts and thereby to hinder and delay his creditors may well be regarded as fraudulent against them, though there is no other evidence of a fraudulent intent; 3 a fortiori, an insolvent debtor's conveyance to his wife or children may be avoided by his creditors.4 Though the grantor was considerably indebted, such a conveyance may fairly be sustained, if it was made without any actual intent to defraud creditors,5 of a reasonable amount, and if the grantor had so abundant means besides the property conveyed to pay all his debts as not materially to lessen their then prospect of payment.6 To set aside such a voluntary settlement, reasonable in amount,7 made upon the meritorious, though not valuable consideration of blood and affection, it should be made to appear either that the grantor was at the time indebted beyond his probable means of payment remaining after the conveyance, or else that he had an actual intention, not merely to secure his wife or children from the hazards of his future business

Winchester v. Charter, 102 Mass. 272; 12 Allen 606; Thacher v. Phinney, 7 Allen 146; Wilson v. Kohlheim, 46 Miss. 346; Offutt v. King, 1 McArthur 312.

² Smith v. Vodges, 92 U. S. 183; Emerson v. Bemis, 69 Ill. 537; Russell v. Fanning, 2 Ill. Ap. 632; Johnson v. West, 43 Ala. 689; Morris v. Harvey, 4 Ala. 300; Salmon v. Smith, 58 Miss. 399; Walsh v. Ketchum, 84 Mo. 427; Pike v. Miles, 23 Wisc. 164; Chambers v. Sallie, 29 Ark. 407; Myers v. Sheriff, 21 La. An. 172.

³ Parish v. Murphree, 13 Howard 92; Worthington v. Shipley, 5 Gill 449; Jones v. Slubey, 5 Har. & J. 372; Bullett v. Worthington, 3 Md. Ch. 99; Coleman v. Cocke, 6 Rand. 618; Kissam v. Edmundson, 1 Ired. Eq. 180; Brice v. Myers, 5 Ohio 121; Moreland v. Atchison, 34 Tex. 351.

⁴ Core v. Cunningham, 27 W. Va. 206; Cook v. Johnson, 12 N. J. Eq. 51; Doughty v. King, 10 Id. 396; Burpee v. Bunn, 22 Cal. 194; Van Bibber v. Mathis, 52 Tex. 406; Reynolds v. Lansford, 16 Tex. 286.

⁵ Childs v. Connor, 48 How. Pr. 513; Thompson v. Thompson, 82 Penn. St. 378; Van Wyck v. Seward, 18 Wend. 375.

⁶ Wallace v. Penfield, 106 U. S. 260; Sparkman v. Place, 5 Benedict 184; Pratt v. Curtis, 2 Lowell 87; Holden v. Burnham, 63 N. Y. 74; Van Wyck v. Seward, 6 Paige 62; Taylor v. Eatman, 92 Nor. Car. 601; Merrell v. Johnson, 96 Ill. 224; Gridley v. Watson, 53 Ill. 186; Ricketts v. McCully, 7 Heisk. 712; Morrison v. Clark, 55 Tex. 437.

 $^{^7}$ Foster v. Foster, 56 Vt. 540; Bongard v. Block, 81 Ill. 186; Corder v. Williams, 40 Iowa 582.

ventures, but to enable himself by means of the conveyance to avoid payment of his present or future debts.¹ If the grantor is not indebted,² or if he makes ample provision for the payment of his debts,³ or if the full value of the property conveyed is secured to his creditors,⁴ the settlement, though it includes all the property of the grantor, if that is no more than a reasonable provision,⁵ is valid, unless made for the purpose of obtaining credit and defrauding his future creditors.

It has been affirmed in North Carolina and denied in Pennsylvania that a father's conveyance to his sons in consideration of their agreement to pay his debts is void as to his creditors.⁶ A husband's gift to his wife will be upheld unless it affects the rights of his creditors.⁷ A creditor who has been already amply secured, or who had assented to such a settlement, could not afterwards avoid it.⁸ But the amount retained must be really, and not merely nominally, enough to discharge existing liabilities.⁹ A settlement made upon one not a blood relation is not regarded as made upon a meritorious consideration.¹⁰ A voluntary settlement made by one largely indebted at the time is generally regarded as primâ facie fraudulent,¹¹ and the burden of proof to sustain it is thrown upon those who claim under it.¹²

- ¹ Ross v. Draper, 55 Vt. 404; Winchester v. Charter, 12 Allen 606; Pomeroy v. Bailey, 43 N. H. 118; Carr v. Breese, 81 N. Y. 584, reversing S. C. 18 Hun 134; Brown v. Austen, 35 Barb. 341; Smith v. Reavis, 7 Ired. Law 341; O'Daniel v. Crawford, 4 Dev. Law 197; Morgan v. McClelland, 3 Id. 82; Freeman v. Eatman, 3 Ired. Eq. 81; Cottrell v. Smith, 63 Iowa 181; Beach v. Baldwin, 14 Mo. 597.
- 2 Tootle v. Coldwell, 30 Kans. 125; Wheeler & Wilson Mfg. Co. v. Monahan, 63 Wisc. 198; Haskell v. Bakewell, 10 B. Mon. 206.
 - ³ Lockwood v. Krum, 34 Ohio St. 1; Hitt v. Ormsbee, 12 Ill. 166.
 - ⁴ Fleischer v. Dignon, 53 Iowa 288; Chaffe v. Halpin, 62 Miss. 1.
 - ⁵ Wood v. Broadley, 76 Mo. 23.
- ⁶ Jessup v. Johnson, 3 Jones Law 335; Waller v. Mills, 3 Dev. Law 515; Pattison v. Stewart, 6 Watts & S. 72.
 - ⁷ Borst v. Spelman, 4 N. Y. 284.
- ⁸ Stephenson v. Donahue, 40 Ohio St. 184; Zuver v. Clark, 104 Penn. St. 222; Pell v. Tredwell, 5 Wend. 661.
 - ⁹ Patterson v. McKinney, 97 Ill. 41.
 - ¹⁰ Burton v. Le Roy, 5 Sawyer, C. C., 510; Caswell v. Hill, 47 N. H. 407.
- ¹¹ United States v. Griswold, 7 Sawyer 311; Metropolitan Bank v. Hitz, 1 Mackey 111; Fink v. Denny, 75 Va. 663; McMasters v. Edgar, 22 W. Va. 673; Welcome v. Batchelder, 23 Mc. 85; Conway v. Brown, 5 Heisk. 237; Blue v. Penniston, 27 Mo. 272; Langford v. Thurlby, 60 Iowa 105.
- Pratt v. Curtis, 2 Lowell 87; French v. Holmes, 67 Me. 186; Holden v. Burnham, 63 N. Y. 74; Seward v. Jackson, 8 Cow. 406; Thompson v. Hammond, 1 Edw. Ch. 497; Spicer v. Ayres, 53 How. Pr. 405; Cowen v. Alsop, 51 Miss. 158;

A conveyance or settlement made in contemplation and consideration of an intended marriage rests upon a valuable consideration. A voluntary conveyance will, upon the marriage of the grantee being induced by the conveyance, become a conveyance for a valuable consideration, good in the absence of fraud against the donor's creditors or subsequent grantees,2 if it was made as an inducement to that marriage,3 though children born to the parties before the marriage are to be benefited by it.4 Even a valid promise of marriage is a valuable consideration for the conveyance of an estate, and will enable the grantee to hold the property against the grantor's creditors or subsequent purchasers.5 If after such a conveyance the marriage turned out to be void through the fault of the grantee, his reconveyance of the estate would not be voluntary, and would be good against his creditors.6 The husband's ante-nuptial settlement upon his wife, though made by him with the intention of defrauding his creditors, will not be set aside at their suit unless she were privy to his fraud.7 If she was privy to his fraud, she cannot uphold the settlement; and her privity may be inferred from circumstances, such as her knowledge of his embarrassment, the extravagance of the settlement, the illegality of the marriage engagement, or similar grounds of suspicion.8 Her mere knowledge that he is indebted, standing by itself, is not sufficient.9 A post-nuptial settlement made bonâ fide by a husband upon his wife in execution of a valid ante-nuptial agreement to do so is good against his creditors; 10 but the post-nuptial settle-

Herzog v. Weiler, 24 W. Va. 199; Welcher v. Price, 2 Lea 666; Elwell v. Walker, 52 Iowa 256; Baldwin v. Tuttle, 23 Iowa 66; Semmens v. Walters, 55 Wisc. 675.

¹ Otis v. Spencer, 102 Ill. 622; Pierce v. Barrington, 58 Vt. 649.

- ² Bentley v. Harris, 2 Grattan 357; Whelan v. Whelan, 3 Cow. 537; Wood v. Jackson, 8 Wend. 9; Verplank v. Sterry, 12 Johns. 536; Sterry v. Arden, 1 Johns. Ch. 261; Mills v. Morris, 1 Hoffman 419.
 - ³ Stokes v. Jones, 18 Ala. 734; Whillock v. Grisham, 3 Sneed 237.
 - ⁴ Coutts v. Greenhow, 2 Munf. 363; 4 Hen. & M. 485.
 - ⁵ Smith v. Allen, 5 Allen 454. Contra, Lionberger v. Baker, 88 Mo. 447.
 - ⁶ Forbush v. Willard, 16 Pick. 42.
- 7 Prewitr. Wilson, 103 U. S. 22; McGowan v. Hitt, 16 So. Car. 602; Bonser v. Miller, 5 Oregon 110.
- 8 Prewit v. Wilson, 103 U. S. 22 and 3 Woods 631; Magniac v. Thompson, 7 Peters 348 and 1 Baldwin 344; Keep v. Keep, 7 Abbott New Cas. 240; Herring v. Wickham, 29 Gratt. 628; Fisher v. Schlosser, 41 Ohio St. 147; Gordon v. Worthley, 48 Iowa 429.
 - ⁹ McGowan v. Hitt, 16 So. Car. 602; Herring v. Wickham, 29 Gratt. 628.
- ¹⁰ Lockwood v. Nelson, 16 Ala. 294; Andrews v. Jones, 10 Ala. 400; Kinnard v. Daniel, 13 B. Mon, 496; Saunders v. Ferrell, 1 Ired. Law 97.

ment must be made in good faith and in accordance with an ante-nuptial agreement therefor actually proved to be valid.1 A conveyance made by a husband through a third person to his wife on a consideration of money received by him from her, which but for the relation of husband and wife would be a valuable consideration, is not, as against his creditors, to be regarded as a voluntary conveyance.2 If she has lent money to him, his subsequent conveyance to her through a third person in repayment of the loan rests upon a valuable consideration,3 even though the debt is barred by the statute of limitations (no fraud appearing); 4 and though he is heavily indebted to others, he may prefer her 5 or his children, 6 as he might any other creditor; but such a transaction will be sharply scrutinized,7 as will all transactions between husband and wife which result in putting the husband's property into her ownership and beyond the reach of his creditors.8 Property standing in the name of the wife and wholly paid for by her own means cannot be disturbed by her husband's creditors,9 even though it may have been conveyed to her from him; 10 and where a

Magniac v. Thompson, 7 Peters 348; Dygert v. Remerschneider, 32 N. Y. 629; Hall v. Light, 2 Duv. 358; Reade v. Livingston, 3 Johns. Ch. 481; Hussey v. Castle, 41 Cal. 239.

 $^{^2}$ Draper v. Buggee, 133 Mass. 258 ; Atlantic Bank v. Tavener, 130 Mass. 407 : Bancroft v. Curtis, 108 Mass. 47.

³ Miedsker v. Bonebrake, 108 U. S. 66; Tarsney v. Turner, 2 Flippin 735; Benson v. Maxwell, 105 Penn. St. 274; Babcock v. Eckler, 24 N. Y. 623; Warren v. Jones, 68 Ala. 449; Almond v. Gairdner, 76 Ga. 699; Hogan v. Robinson, 94 Ind. 138; Huffman v. Copeland, 86 Ind. 224; Brookville Bank v. Kimble, 76 Ind. 195; McKamey v. Thorp, 61 Tex. 648.

⁴ Comer v. Allen, 72 Ga. 1; Kennedy v. Powell, 34 Kans. 22; Rudershausen v. Atwood, 19 Ill. Ap. 58; City Bank v. Wright, 68 Iowa 132.

⁵ Ferguson v. Spear, 65 Me. 277; Jewett v. Noteware, 30 Hun 192; Woodworth v. Sweet, 44 Barb. 268; Patton v. Conn, 114 Penn. St. 183; Wingerd v. Fallon, 95 Id. 184; Crane v. Barksdell, 59 Md. 534; Leppig v. Bretzel, 48 Mich. 321; Brigham v. Fawcett, 42 Id. 542; Hill v. Bowman, 35 Id. 191; Dice v. Irvin, 110 Ind. 561; Tomlinson v. Matthews, 98 Ill. 178; Iowa Bank v. Weber, 72 Iowa 137; Stamy v. Laning, 58 Iowa 662; Brickley v. Walker, 68 Wisc. 563; Miller v. Krueger, 36 Kans. 344; Meyer v. Sulzbacher, 76 Ala. 120.

⁶ Sharpe v. Williams, 76 Nor. Car. 87.

⁷ Bates v. McConnell, 31 Fed. Rep. 588; Borden v. Doughty, 42 N. J. Eq. 314; Webb v. Ingham, 29 W. Va. 389; Kennedy v. Powell, 34 Kans. 22; Eisfield v. Dill, 71 Iowa 442; Leonard v. Green, 34 Minn. 137.

⁸ Lipscomb v. Lyon, 19 Neb. 511; Breslauer v. Geilfuss, 65 Wisc. 377.

 $^{^9}$ Eads r. Thompson, $109\,\mathrm{Hl}.$ 87 ; Campbell r. Campbell, 79 Ky. 395 ; Hamilton r. Steele, 22 W. Va. 348.

Addicken v. Humphal, 56 Iowa 365; Draper v. Buggee, 133 Mass. 258; Ban-

married woman is equitably the owner of land, but the legal title is in her husband, his creditors cannot avoid his conveyance to her, made without any fraud on her part, as if he buys property for her, with her means, but takes the title in his own name, without her consent, or as trustee for her, and afterwards causes it to be conveyed to her; 2 and the same rule will be applied as between parent and child,3 and in all similar cases,4 if a trust really exists.5 Nor can the husband's creditors complain of his having joined without any consideration in his wife's conveyance of her separate property.6 He may, as against his creditors, make a reasonable settlement upon her in consideration of property received by him through her; 7 and his appropriation of the corpus of her separate property or of her ancestral estate, with the understanding that it is to be repaid, will furnish a valuable consideration for his subsequent conveyance to her; 8 so he may settle upon her such distributive share, not yet reduced by him to possession.9 A contract made between husband and wife in good faith and for an honest consideration, and not intended to hinder, delay, or defraud his creditors, will not be declared fraudulent merely because of his subsequent insolvency; 10 if actual fraud is claimed, it must be proved. 11 If she has renounced her own valuable estate to

croft v. Curtis, 108 Mass. 47; Mehlhop v. Pettibone, 54 Wisc. 652; Grant v. Ward, 64 Me. 239; Baldwin v. Ryan, 3 Thomp. & C. 252.

¹ French v. Motley, 63 Me. 326; Steadman v. Wilbur, 7 R. I. 481; Stetson v. O'Sullivan, 8 Allen 321; Savage v. O'Neil, 44 N. Y. 298; Babcock v. Eckler, 24 N. Y. 623; Grabill v. Moyer, 45 Penn. St. 530; Barncord v. Kuhn, 36 Id. 383; Taylor v. Duesterberg, 109 Ind. 165; Bremmerman v. Jennings, 101 Ind. 253.

 2 Seeders r. Allen, 98 Ill. 468 ; Lord v. Bishop, 101 Ind. 334 ; Heaton v. White, 85 Ind. 376 ; Leonard v. Barnett, 70 Ind. 367 ; Eagan v. Downing, 55 Ind. 65 ; Rutherford v. Chapman, 59 Ga. 177 ; Farnham v. Kennedy, 28 Minn. 365. But see Smith v. Lane, 3 Pick. 205.

³ Victor Sewing Machine Co. v. Jacobs, 46 Mich. 494.

- ⁴ Lewiston Bank v. Dwelly, 72 Me. 223; Anderson v. Biddle, 10 Mo. 23.
- ⁵ Champlin v. Seeber, 56 How. Pr. 46.
- ⁶ Besser v. Joyce, 9 Oregon 310.
- ⁷ Poindexter v. Jeffries, 15 Grattan 363; United States Bank v. Brown, 2 Hill Eq. 558; Marshall v. McDaniel, 8 B. Mon. 173.
- Syracuse Plough Co. r. Wing, 85 N. Y. 421; Rogers v. Mayer, 59 Miss. 524; Vincent v. State, 74 Ala. 274; Lyne v. Wann, 72 Ala. 43.
- ⁹ Gassett v. Grout, 4 Met. 486; McCauley v. Rhodes, 7 B. Mon. 462; Bradford v. Goldsborough, 15 Ala. 311.
 - ¹⁰ Van Deuzer v. Peacock, 11 Neb. 245.
- 11 Evans v. Rugee, 57 Wisc. 623; Popfinger v. Yutte, 102 N. Y. 38; Wilbur v. Fradenburgh, 52 Barb. 474.

her husband under the honest impression that he has made sufficient provision for her by a voluntary conveyance, his creditors cannot afterwards set it aside. But the existence of the debt or the actual payment of the consideration which is set up to sustain the husband's settlement upon his wife must be clearly made out.² His promise to repay her money which had become his by operation of law will not create a valid indebtedness,3 or his promise to pay her for services which it is her duty to render.4 If he has received her money or other property under circumstances which indicate that it was a gift without promise or expectation of repayment, 5 retaining it until he has become embarrassed,6 this will not support his voluntary conveyance to her; 7 so if the circumstances show that the claim of an obligation on his part to her was merely a contrivance.8 If part of the consideration is shown to have actually proceeded from the wife, the transaction will be governed by the rules which we have seen to be applicable to conveyances upon an inadequate consideration.9 If a debtor conveys either directly or indirectly to a third person who buys in good faith and for value, such third person's voluntary conveyance to the debtor's wife or children is valid against the

¹ United States Bank v. Brown, Riley Ch. 131.

 3 Joiner v. Franklin, 12 Lea 420 ; Lewis v. Caperton, 8 Gratt. 148 ; Peirce v. Thompson, 17 Pick. 391 ; Williams v. Thompson, 13 Pick. 298 ; Bolling v. Jones, 67 Ala, 508.

⁴ Coleman v. Burr, 93 N. Y. 17; Campbell v. Bowles, 30 Gratt. 652; Mc-Anally v. O'Neil, 56 Ala. 299; McLemore v. Nuckolls, 37 Ala. 662.

 5 As in Meredith v. Citizens' Bank, 92 Ind. 343; Hanson v. Manley, 72 Iowa 48.

⁶ As in City Bank v. Hamilton, 34 N. J. Eq. 158.

 7 Odell v. Flood, 8 Benedict 543 ; Knowlton v. Mish, 8 Sawyer 625 ; Watson v. Cummins, 40 N. J. Eq. 483 ; Grover & Baker S. M. Co. v. Radcliff, 63 Md. 496 ; Moore v. Orman, 56 Iowa 39 ; Bailey v. Kansas Mfg. Co., 32 Kans. 73.

⁸ Saloman v. Moral, 53 How. Pr. 342; Planck v. Schermerhorn, 3 Barb. Ch. 644; Treat v. Curtis, 124 Mass. 348; Luers v. Brunjes, 34 N. J. E. 19; Bayne v. State, 62 Md. 100; McGinnis r. Curry, 13 W. Va. 29; Irby r. Henry, 16 So. Car. 617; Thompson v. Feagin, 60 Ga. 82; Roper r. Hackney, 15 Fla. 323; New r. Oldfield, 110 Ill. 138; Tomlinson v. Matthews, 98 Ill. 178; Horton v. Dewey, 53 Wisc. 410.

 9 See Moyer v. Adams, 9 Biss, 390; Snow v. Paine, 114 Mass. 520; Hinckley v. Phelps, 2 Allen 77; Aber v. Brant, 36 N. J. Eq. 116; Cicotte v. Stebbins, 49 Mich. 631.

 $^{^2}$ Humes r. Scruggs, 94 U. S. 22; Wilson r. Silkman, 97 Penn. St. 509; Gicker r. Martin, 50 Id. 138; Briggs r. Mitchell, 60 Barb. 288; Warren r. Ranney, 50 Vt. 653; Alston r. Rowles, 13 Fla. 117; Secor r. Souder, 95 Ind. 95; Hockett r. Bailey, 86 Ill. 74; Farmers' Bank r. Long, 7 Bush 337; Fisher r. Shelver, 53 Wisc. 498; Allen r. Walt, 9 Heisk. 242; Wake r. Griffin, 9 Neb. 47.

creditors of the original owner.1 The wife's purchase at a judicial sale of her husband's property, though it may be otherwise invalid, is not necessarily fraudulent as against his creditors.2 Her release of dower in his lands, or conveyance of her property made at his request and for his benefit, is a valuable consideration for his conveyance to her of property which is no more than a fair equivalent for the value of her interest,3 though this conveyance be made after he has become insolvent; 4 but it will not be sustained if it was made in bad faith, for an extravagant amount, or if her release of dower was made with her knowledge merely to perfect a fraudulent conveyance.⁵ And the husband's assignee will have the same right against the wife to avoid a preference that he would have against any preferred creditor of the husband.6 The wife's mere promise to release her dower, though subsequently executed, or her release upon a bare expectation of recompense without an agreement therefor, is not a valid consideration for a subsequent settlement.7 A conveyance to a married woman by a person other than her husband is primâ facie valid; 8 but if it appears that the property was purchased by her husband and paid for by his means, the transaction will be governed by the same rules as if he had conveyed through a third party to her.9 His conveyance to her father in consideration merely of

¹ Van Riswick v. Spalding, 117 U. S. 370; Crawfordsville Bank v. Carter, 89 Ind. 317; Evans v. Nealis, 69 Ind. 148; Mast v. Henry, 65 Iowa 193; Smith v. Riggs, 56 Iowa 488; Fulton v. Woodman, 54 Miss. 158; McPherson v. McPherson, 21 So. Car. 261; Wilson v. Butler, 3 Munf. 559; Compton v. Perry, 23 Tex. 414.

 $^{^2}$ Belcher r. Clark, 68 Ga. 93; Stetson r. O'Sullivan, 8 Allen 321; Cheatham r. Thornton, 11 Lea 295.

³ Sykes v. Chadwick, 18 Wallace 141; Rundlett v. Ladd, 59 N. H. 15; Brooks v. Dalrymple, 12 Allen 102; Bullard v. Briggs, 7 Pick, 533; Garlick v. Strong, 3 Paige 440; Reiff v. Eshleman, 52 Md. 582; William & Mary College v. Powell, 12 Gratt, 372; Singree v. Welch, 32 Ohio St. 320; Brown v. Rawlings, 72 Ind. 505; Gwyer v. Figgins, 37 Iowa 517.

⁴ Holmes v. Winchester, 133 Mass. 140; Sedgwick v. Tucker, 90 Ind. 271; Payne v. Miller, 103 Ill. 442.

⁵ Farwell r. Kerr, 28 Fed. Rep. 345; Wilson v. Jordan, 3 Woods 642; Gordon v. Tweedy, 71 Ala. 202; Allen v. Perry, 56 Wisc. 178.

⁶ Holmes v. Winchester, 135 Mass. 299; Winchester v. Holmes, 138 Mass. 540.

⁷ Lewis v. Caperton, 8 Gratt. 148; Harrison v. Carroll, 11 Leigh 476; Taylor v. Moore, 2 Rand. 563; Woodson v. Pool, 19 Mo. 340.

⁸ Arndt v. Harshaw, 53 Wisc. 269; Hopson v. Payne, 7 Mich. 334.

⁹ Clark v. Chamberlain, 13 Allen 257; Guthrie v. Gardner, 19 Wend. 414; Ramsey v. Voorhees, 38 N. J. Eq. 282; Conover v. Ruckman, 36 Id. 493; Alston

property previously given by her father to her is purely voluntary as against his creditors. If the moneys of her husband who is insolvent or largely indebted have been applied to the improvement of her separate real estate, in order to secure it to her at the expense of his creditors, they have been allowed, to the extent of the increase in value thus obtained, to hold her estate for the payment of their demands; 2 but this is true only of permanent improvements made upon the land of one who is of age and competent to have contracted for them,3 and will not be applied to such improvements made in good faith by one solvent at the time, though he should afterwards become bankrupt.4 A conveyance by way of settlement upon the grantor's former mistress and illegitimate children is a voluntary conveyance, though it may be sustained if made in good faith to reimburse the mother for the care and education of the children.⁵ A debtor may insure his life for the benefit of his wife for a reasonable sum; but if this is done in fraud of his creditors, they may hold the proceeds of the policies, either wholly or to the amount of the premiums paid by him in fraud of their rights, according to the circumstances.⁶ A husband's conveyance to his wife in consideration of her agreement to live apart from him is purely voluntary; 7 not so his conveyance by way of alimony to which she has a legal claim.8 Though the wife has joined to release dower in her husband's deed of his real estate, yet her right is revived when this deed is set aside by his creditors, and their satisfaction must be subject to her dower-

v. Rowles, 13 Fla. 117; Craig v. Gamble, 5 Fla. 430; Adams v. O'Rear, 80 Ky. 129; Hanna v. Aebker, 84 Ind. 411; Boulton v. Hahn, 58 Iowa 515; Edmonson v. Meacham, 50 Miss. 34; Bennett v. Hutson, 33 Ark. 762; Baldwin v. Johnston, 8 Ark. 260.

- ¹ Farmers' Bank v. Long, 7 Bush 337.
- ² Burt'v. Timmons, 29 W. Va. 441; Kanawha Valley Bank v. Wilson, 25 Id. 242; Heck v. Fisher, 78 Ky. 643; Lynde v. McGregor, 13 Allen 182; Caswell v. Hill, 47 N. H. 407.
- ³ Dick v. Hamilton, 1 Deady 322; Mathes v. Dobschuetz, 72 Ill. 438; Shackleford v. Collier, 6 Bush 149. See Webster v. Hildreth, 33 Vt. 457; Ewing v. Cantrell, Meigs 364.
 - 4 Curry v. Lloyd, 22 Fed. Rep. 258.
- ⁵ Wait v. Day, 4 Denio 439; Hargroves v. Meray, 2 Hill Eq. 222; Potter v. Gracie, 58 Ala. 303.
- ⁶ Ingles v. New England Ins. Co., 27 Fed. Rep. 249; Ætna Bank v. Manhattan Ins. Co., 24 Fed. Rep. 769; Ætna Bank v. U. S. Ins. Co., Id. 770; Stokes v. Coffey, 8 Bush 533; Catchings v. Manlove, 39 Miss. 655.
 - ⁷ Smith v. Kehr, 20 Wallace 31; 2 Dillon 50; Morgan v. Potter, 17 Hun 403.
 - ⁸ Stephens v. Olive, 2 Brock. Va. Cas. 90; Wells v. Stout, 9 Cal. 479.

right. 1 Though a mere gratuity cannot afterwards be converted into a valuable consideration for a conveyance to the prejudice of the grantor's creditors,2 yet the release of the interest acquired by a child under a valid voluntary settlement by the father is a valuable consideration for a new conveyance by the father.³ Conveyances made by a father to his children for the alleged consideration of services rendered by them to him will be regarded as voluntary if the children were minors,4 or if the services were rendered by the children while members of the grantor's family and without an actual agreement that they should be paid for: 5 they are voluntary settlements, and will be upheld or avoided, like any other voluntary settlements, according to the nature of the transaction.6 But he may emancipate his minor children; and after such emancipation the fruits of their labors cannot be reached by his creditors;7 the father's renunciation of a mere privilege gives his creditors no ground of complaint.8 And services rendered to a father by an adult child, for which the father has agreed to pay, afford in the absence of fraud a valuable consideration as against the father's creditors for a conveyance of land by him to the child.9 A deed of land given to a child in execution of a previous parol gift is wholly voluntary; 10 but if the grantee has made expenditures in consequence

¹ Humes v. Scruggs, 64 Ala. 40; Lockett v. James, 8 Bush 28; Malony v. Horan, 12 Abbott Pr., N. S., 289; Lowry v. Smith, 16 N. Y. Supreme Ct. 514.

² Clay v. McCally, 4 Woods 605; Appleton Bank v. Bertschky, 52 Wisc. 438.

³ Davis v. Kennedy, 105 Ill. 300; Rumbolds v. Parr, 51 Mo. 592.

⁴ Dowell v. Applegate, 8 Sawyer, C. C., 427; Brown v. McDonald, 1 Hill Eq. 297; Dick v. Grissom, 1 Freem. Ch. 428; Danley v. Rector, 10 Ark. 211; Swartz v. Hazlett, 8 Cal. 118.

⁵ Irish v. Bradford, 64 Iowa 303; Patton v. Conn, 114 Penn. St. 183; Sanders v. Wagonseller, 19 Id. 248; Hack v. Stewart, 8 Id. 213; Stearns v. Gage, 79 N. Y. 102; Miller v. Sauerbier, 30 N. J. Eq. 71; King v. Malone, 31 Gratt. 158; Faloon v. McIntyre, 118 Ill. 292; Guffin v. First Nat'l Bank, 74 Ill. 259; Kaye v. Crawford, 22 Wisc. 320.

⁶ Haston v. Castner, 29 N. J. Eq. 536; Updike v. Titus, 13 Id. 151; United States v. Mertz, 2 Watts 406; Cansler v. Cobb, 77 N. C. 30; Seymour v. Briggs, 11 Wisc. 196.

⁷ Partridge v. Arnold, 73 Ill. 600; Manchester v. Smith, 12 Pick. 113; Bray v. Wheeler, 29 Vt. 514; Atwood v. Holcomb, 39 Conn. 270; Rains v. Dunnegan, 71 Mo. 148.

⁸ Tompkins v. Prentice, 12 La. An. 465.

⁹ Byrnes v. Clark, 57 Wisc. 13; Collier v. French, 64 Iowa 577.

¹⁰ Hubbard v. Allen, 59 Ala. 283; Stokes v. Oliver, 76 Va. 72; Hawkins v. Cramer, 63 Tex. 99.

of the gift, these will supply a valuable consideration for the subsequent conveyance; 1 if the consideration is utterly inadequate, this, though not conclusive, will be regarded as a badge of fraud.2 Father and children, if any indebtedness exists between them, may prefer each other, unless prevented by bankrupt or insolvent laws, though their effect is to deprive other creditors of payment,3 unless both parties intend to defraud such other creditors.4 The burden of proof is on one who attempts to impeach a deed for lack of consideration; 5 but if the proofs of the character of the consideration and of the good faith of the parties are not satisfactory, a conveyance between members of the same family will readily be regarded, in favor of creditors, as merely voluntary; 6 otherwise it will be sustained.7 A child who has taken from his father a voluntary conveyance which is void against the latter's creditors may properly, though a minor, reconvey to his father or for their benefit,8 but if such voluntary grantee has contracted debts on the faith of his apparent ownership, his creditors may set aside his voluntary reconveyance.9 A deed from parent to child in consideration of the child's agreement to support the parent or others for life rests upon a valuable consideration, 10 and is valid between the parties, but may be avoided by the grantor's creditors if in fact intended to defraud them. 11 Many cases hold that such a conveyance is fraudulent in law as against the parent's creditors, as being in effect a conveyance to the use of the

 $^{^1}$ Patterson r. McKinney, 97 Ill. 41; Dougherty r. Harsel, 91 Mo. 161; King v. Thompson, 9 Peters 204.

² Jackson v. Evans, 41 Mich. 510; Lyon v. Haddock, 59 Iowa 682; Hubbard v. Allen, 59 Ala. 283; Willis v. Gattman, 53 Miss. 721.

³ Howard v. Rynearson, 50 Mich. 307; State Bank v. Whittle, 48 Mich. 1; Leach v. Flack, 31 Hun 605; Dart v. Farmers' Bank, 27 Barb. 337.

 $^{^4}$ Prout v. Vaughn, 52 Vt. 451; Blanchard v. Glasier, 64 Iowa 675; Miller v. Sauerbier, 30 N. J. Eq. 71.

⁵ Williams r. Williams, 11 Lea 355; Abney r. Kingsland, 10 Ala. 355; Boynton v. Rees, 8 Pick, 329.

⁶ Haymaker's Appeal, 53 Penn. St. 306; Miller v. Sauerbier, 30 N. J. Eq. 71; Knight v. Capito, 23 W. Va. 639; Livesay v. Beard, 22 Id. 585.

⁷ Preston v. Williams, 81 Ill. 176; Patterson v. Johnson, 59 Iowa 397; Pattison v. Stewart, 6 Watts & S. 72.

⁸ Starr v. Wright, 20 Ohio St. 97; McGregor Bank v. Hostetter, 61 Iowa 395.

⁹ Budd v. Atkinson, 30 N. J. Eq. 530; Susong v. Williams, 1 Heisk. 625.

¹⁰ Worthy v. Brady, 91 N. C. 265; Muenks v. Bunch, 90 Mo. 500.

 $^{^{11}}$ Rynearson v. Turner, 52 Mich. 7; Slater v. Dudley, 18 Pick. 373; Gunn v. Butler, Id. 248; Geiger v. Welch, 1 Rawle 349; Miner v. Warner, 2 Grant's Cas. 448.

grantor, which may always be avoided by his creditors. But if the grantee has paid a full consideration for the property, his additional agreement to support his parents will not avoid his purchase.² A father's agreement to pay to his son all his future earnings in consideration of his son's agreement to support him for life, has been avoided by the father's creditors on proof that the father's earnings much exceeded the expense of his support; 3 for he could not store up his future earnings for the benefit of himself and his family at the expense of his creditors.4 The same principles are applied to conveyances made by a debtor to a stranger in blood to ensure or provide for the future support of himself or his family.⁵ Property which has been purchased and paid for by a debtor, but conveyed to another with intent to keep it from the purchaser's creditors, has been held to be beyond their reach, on the ground that there was no conveyance of the debtor's property made with intent to delay or defeat his creditors; 6 but they are generally allowed to appropriate it by legal process whether the transfer was made directly by the purchaser or, by his procurement and direction, by his vendor, though the presumption of fraudulent intent is no more conclusive than in any case of a fraudulent conveyance.8 In Massachusetts, the rule generally adopted

 $^{^1}$ Lawson v. Funk, 108 Ill. 502; Moore v. Wood, 100 Ill. 451; Guffin v. Morrison Bank, 74 Ill. 259; Graves v. Blondell, 70 Me. 190; Egery v. Johnson, Id. 258; Sidensparker v. Sidensparker, 52 Me. 481; Graham v. Rooney, 42 Iowa 567.

 $^{^2}$ Howe Machine Co. v. Claybourne, 6 Fed. Rep. 438; Easum v. Pirtle, 81 Ky. 561; Vial v. Mathewson, 34 Hun 70.

³ Tripp v. Childs, 14 Barb. 85.

⁴ Hamilton v. Zimmerman, 5 Sneed 39; Gragg v. Martin, 12 Allen 498; Waddingham v. Loker, 44 Mo. 132; Patterson v. Campbell, 9 Ala. 933.

⁵ See Cornwall in re, 9 Blatchf. 114; Hapgood r. Fisher, 34 Me. 407; Rollins r. Mooers, 25 Id. 192; Webster v. Withey, Id. 326; Jones r. Spear, 21 Vt. 426; Crane r. Stickles, 15 Vt. 252; Jackson r. Parker, 9 Cow. 73; Hennon r. McClane, 88 Penn. St. 219; Johnston r. Zane, 11 Gratt. 552; Moore r. Wood, 100 Ill. 451; Annis v. Bonar, 86 Ill. 128; Henry v. Hinman, 25 Minn. 199.

⁶ Bean v. Brackett, 34 N. H. 102; Marshall v. Marshall, 2 Bush 415.

⁷ Spaulding r. Fisher, 57 Me. 411; Dockray v. Mason, 48 Me. 178; Godding r. Brackett, 34 Me. 27; Dewey v. Long, 25 Vt. 564; Moore v. Roe, 35 N. J. Eq. 90; Baltimore Bank r. Yeatman, 53 Md. 443; Wall v. Fairley, 73 Nor. Car. 464; Vanzant r. Davies, 6 Ohio St. 52; Fairbairn v. Middlemiss, 47 Mich. 372; Eiler v. Crull, 112 Ind. 318; Lindley r. Cross, 31 Ind. 106; State Bank v. Harrow, 26 Iowa 426; Tupper v. Thompson, 26 Minn. 385; Simmons v. Ingram, 60 Miss. 886; Moog v. Farley, 79 Ala. 246; Marriott r. Givens, 8 Ala. 694; Miller v. Fraley, 21 Ark. 22.
⁸ Dunlap v. Hawkins, 59 N. Y. 342.

was first declared; then denied; then reëstablished by statute.¹

A false statement in a transfer of property of the alleged consideration on which it was made is, as against creditors, a highly suspicious circumstance.² This principle has been applied to false statements of the amount of the debt secured by a mortgage,³ to the enforcement of a judgment or execution for a larger sum than the real debt,⁴ to transfers which purport to be made in payment of an indebtedness either previously discharged ⁵ or not sufficiently proved to have existed.⁶ But the inference of fraud arising from any such false statement may be rebutted.⁷

The use of generalities in a conveyance, without exact description of the property conveyed, is a badge of fraud.⁸ The lack of any inventory or measurement or means of identification of property transferred in payment of an old debt is a suspicious circumstance, though not in itself conclusive of fraud.⁹ So a general averment of the existence of a valuable consideration for a mortgage, without any full or particular statement of the consideration of the debt secured thereby, has been held to be insufficient.¹⁰

- 1 Goodwin v. Hubbard, 15 Mass, 210; Howe v. Bishop, 3 Met. 26; Endicott, J., in Hunt v. Mann, 132 Mass. 53.
- 2 Thurman v. Jenkins, 58 Tenn. 426; Gibbs v. Thompson, 7 Humph. 179; Peebles v. Horton, 64 N. C. 374; McKinster v. Babcock, 26 N. Y. 378; King v. Hubbell, 42 Mich. 597; Wood v. Scott, 55 Iowa 114; Moore v. Roe, 35 N. J. Eq. 90.
- ³ Frost v. Warren, 42 N. Y. 204; Kalk v. Fielding, 50 Wisc. 339; McCrassley v. Haslock, 4 Baxter 1; Alabama Ins. Co. v. Pattway, 24 Ala. 544; Willison v. Desinburg, 41 Mich. 156.
- ⁴ Clark v. Douglass, 62 Penn. St. 408; Davenport v. Wright, 51 Penn. St. 292; Shedd v. Bank, 32 Vt. 709; Felton v. Wadsworth, 7 Cush. 587; Ayres v. Husted, 15 Conn. 504; Wilder v. Fondey, 4 Wend. 100; Harris v. Alcock, 10 Gill & J. 226.
- 5 Moore v. Ullman, 80 Va. 307; Clinton Bank v. Cummins, 38 N. J. Eq. 191; Baltimore R. R. Co. v. Hoge, 34 Penn. St. 214.
- ⁶ Jersey City Bank v. O'Rourke, 40 N. J. Eq. 92; Hoboken Bank v. Beckman, 33 Id. 53; Hart v. Flinn, 36 Iowa 366; Haney v. Nugent, 13 Wisc. 283.
- ⁷ Alexander v. Todd, 1 Bond 175; Whittredge v. Edmunds, 63 N. H. 248; Colbern v. Robinson, 80 Mo. 541; Thurman v. Jenkins, 58 Tenn. 426; Terrell v. Green, 11 Ala. 207.
- 8 Conkling v. Shelley, 28 N. Y. 360; Gardner v. McEwen, 19 Id. 123; Lang v. Lee, 3 Rand. 410; Thompson v. Drake, 3 B. Mon. 565; McCain v. Wood, 4 Ala. 258.
 - ⁹ Fitch v. Rising Sun Bank, 99 Ind. 443; Chamberlain v. Dorrance, 69 Ala. 40.
 - ¹⁰ Hawkins v. Alston, 4 Ired. Eq. 137.

A relationship existing between the debtor and his alleged confederates, though not entitled to much weight in itself, will be regarded in connection with other grounds of suspicion; for transactions between parties occupying intimate and confidential relations with each other, especially when they conflict with the rights of creditors, should be scrutinized more carefully than if they were between strangers. The relationship is a circumstance which, when added to other circumstances, may affect the scale of evidence.

The presence of anything out of the usual course of business in a transaction which is sought to be impeached is a badge of fraud.⁵ This applies to the antedating of an instrument,⁶ to any unusual haste in a transfer of property or in the entry of a judgment,⁷ especially if done for the benefit of the debtor's wife,⁸ to other fraudulent transactions between the same parties,⁹ to a voluntary preference by a failing debtor,¹⁰ to the giving of unusual powers in a deed of trust,¹¹ any excess of for-

- 1 Means v. Montgomery, 23 Fed. Rep. 421; Rusie v. Jameson, 62 Iowa 52; Moog v. Farley, 79 Ala. 246; Shealy v. Edwards, 75 Ala. 411; Bradley v. Ragsdale, 64 Ala. 558; Tompkins v. Nichols, 53 Ala. 197; Mathiez v. Day, 36 N. J. Eq. 88; Weaver v. Wright, 13 Rich. 9.
- ² Demarest v. Terhune, 18 N. J. Eq. 45; Owens v. Hobbie, 82 Ala. 466; Montgomery v. Kirksey, 26 Ala. 172; Burt v. Timmons, 29 W. Va. 441; Crawford v. Carper, 4 Id. 56; Swift v. Lee, 65 Ill. 336; Burton v. Shoemaker, 7 Kans. 17; Shadburne v. Amonett, 7 La. An. 89.
- 3 Tyberand v. Raucke, 96 Ill. 71; Sherman v. Hoagland, 73 Ind. 472; Carter v. Carpenter, 7 Bush 257; Leavitt v. La Force, 71 Mo. 353; Goshorn v. Snodgrass, 17 W. Va. 717; Fisher v. Herron, 22 Neb. 183; Marshall v. Green, 24 Ark. 410; Gibson v. Hill, 23 Tex. 77.
- ⁴ Cliek v. Green, 77 Va. 827; Sandlin v. Robbins, 62 Ala. 477; Robinson v. Frankel, 85 Tenn. (1 Pickle) 475; Spoirer v. Eifler, 1 Heisk. 633; Ames v. Gilmore, 59 Mo. 537; Chase v. Welch, 45 Mich. 345; Bell v. Devore, 96 Ill. 217; Jaffers v. Aneals, 91 Ill. 487; Reiger v. Davis, 67 N. C. 185.
- ⁵ Kempner v. Churchill, 8 Wallace 362; Hyde v. Sontag, 1 Sawyer 249; Peirce v. Merritt, 70 Mo. 275; Baum v. Bosworth, 68 Wisc. 196; Brinks v. Heise, 84 Penn. St. 246; Campbell v. Bowles, 30 Gratt. 652; English v. King, 10 Heisk. 666; Grubbs v. Greer, 5 Coldw. 160; Danjean v. Blacketer, 13 La. An. 595.
- ⁶ Shelton v. Church, 38 Conn. 416; Rhoads v. Blatt, 84 Penn. St. 31; Patterson v. Bodenhamer, 9 Ired. Law 96.
 - ⁷ Crittenden v. Coleman, 70 Ga. 293; Floyd v. Goodwin, 8 Yerg. 484.
- 8 Crittenden v. Coleman, ubi supra; McCulloch v. Doak, 68 Nor. Car. 267; Newman v. Cordell, 43 Barb. 448.
- 9 Summers v. Howland, 58 Tenn. 407; Engraham v. Pate, 51 Ga. 537; McCabe v. Brayton, 38 N. Y. 196.
- 10 Kellogg v. Root, 23 Fed. Rep. 525; Leadman v. Harris, 3 Dev. Law 144; Kennedy v. Ross, 2 Mills Const. Ct. 125.
 - ¹¹ Harden v. Wagner, 22 W. Va. 356; Carlton v. Baldwin, 22 Tex. 724.

mality or parade of honesty,¹ and similar instances.² Whether any particular transaction is out of the usual course of business is commonly a question of fact, but a sale might be held to be so as matter of law. A transfer by a retail dealer of all his stock in trade and the good-will of his business would be so; but the character of any sale or transfer by a debtor which might fairly be made in the prosecution of his business must be determined as a question of fact; ³ and the transaction cannot be avoided merely as unusual.⁴ The non-production of evidence which might be adduced to sustain a transfer whose validity has been impeached will warrant an inference against it.⁵

As in the principal case, a sale or transfer, though made for a valuable and adequate consideration, may yet be fraudulent, if made actually to defraud creditors, or upon a secret trust for the benefit of the grantor, if the grantor's fraudulent intent is participated in by the purchaser. A deed given to secure sureties against their liability, though *primâ facie* valid,

¹ Hartshorn v. Eames, 31 Me. 93; Adams v. Davidson, 10 N. Y. 309; King v. Moon, 42 Mo. 551; Comstock v. Rayford, 20 Miss. 369; 9 Id. 423.

² Bouton v. Smith, 113 Ill. 481; Goldstein v. Nunan, 66 Cal. 542; Dorn v. Bayer, 16 Md. 144; Wheelden v. Wilson, 44 Me. 11; Hamilton v. Blackwell, 60 Ala. 545; McCorkle v. Hammond, 2 Jones Law 444; Starr v. Starr, 1 Ohio 321; Campbell v. Landberg, 27 Minn. 454; McCutchen v. Peigne, 4 Heisk. 565; Dunlap v. Haynes, Id. 476; Johnston v. Dick, 27 Miss. 277; Marshall v. Green, 24 Ark. 410; Rousseau v. Lum, 9 La. An. 325.

³ Buffum v. Jones, 144 Mass. 29; Alden v. Marsh, 97 Mass. 160.

⁴ Micou v. Montgomery Bank, 104 U. S. 530; Jenkins v. Einstein, 3 Bissell 128; Forsyth v. Matthews, 14 Penn. St. 100; Kane v. Drake, 27 Ind. 29; Ward v. Wehman, 27 Iowa 279; McQuinnay v. Hitchcock, 8 Tex. 33.

⁵ Zimmer v. Miller, 64 Md. 296; Second National Bank v. Yeatman, 53 Md. 443; Hoffer v. Gladden, 75 Ga. 532; Nicol v. Crittenden, 55 Ga. 497; Parker v. Valentine, 27 W. Va. 677; Devries v. Phillips, 63 Nov. Car. 53; Whitney v. Rose, 43 Mich. 27; Henderson v. Henderson, 55 Mo. 534; Clark v. Depew, 25 Penn. St. 509; Harrell v. Mitchell, 61 Ala. 270; King v. Atkins, 33 La. An. 1057.

⁶ Hightower v. Mustian, 8 Ga. 506; Stone v. Spencer, 77 Mo. 356; Tatum v. Hunter, 14 Ala. 557; Chapel v. Clapp, 29 Iowa 191; Smith v. Culbertson, 9 Rich. Law 106; Crary v. Sprague, 12 Wend. 41; Jackson v. Terry, 13 Johns. 471; Beals v. Guernsey, 8 Johns. 446; Swinford v. Rogers, 23 Cal. 233; Planters' Bank v. Willes Cotton Mills, 60 Ga. 168.

⁷ Hayes v. Reily, 49 N. Y. Superior Ct. 334; Doughten v. Gray, 10 N. J. Eq. 323; Gardinier v. Otis, 13 Wisc. 460; Savage v. Hazard, 11 Neb. 323; Fuller v. Sears, 5 Vt. 527; Brown v. McDonald, 1 Hill Eq. 297.

8 Cooke v. Cooke, 43 Md. 522; Bowyer v. Martin, 27 W. Va. 442; Goshorn v. Snodgrass, 17 W. Va. 717; Hedrick v. Walker, Id. 916; Swift v. Hart, 35 Hun 128; Young v. Ward. 115 Ill. 264; Williamson v. Wachenheim, 58 Iowa 277; Potter v. Stevens. 40 Mo. 229.

may yet be fraudulent in fact. A mortgage given to secure an absolute debt, if also designed with the privity of both parties to defraud other creditors by keeping the property out of their reach, is fraudulent and void against such creditors; 2 and proof that the mortgage was given to secure an existing debt does not as matter of law disprove the existence of such a fraudulent intent; it is only evidence tending in that direction.³ Any stipulation or understanding in a debtor's sale or conveyance whereby a secret substantial advantage is secured to him will be evidence of a secret trust in his favor,4 and if made with the purpose of keeping other creditors from appropriating the property on legal process will enable them to avoid the transfer.⁵ The existence of any such secret trust, inconsistent with the avowed objects of the conveyance, will afford strong, though not conclusive 6 evidence that the transaction is fraudulent,7 and is often held to constitute fraud per se.8 But the mere stipulation that a surplus of the proceeds of property conveyed in trust for the payment of particular debts, after their satisfaction, shall be paid back to the grantor, is not a fraudulent reservation, for it expresses only what the law would give to the grantor at all events, and puts the surplus proceeds directly within the reach of his creditors.9 But an absolute conveyance, honestly made for value, cannot be avoided simply

¹ Crawford v. Kirksey, 50 Ala. 590; Planters' Bank v. Clarke, 7 Ala. 765.

² Stinson v. Hawkins, 16 Fed. Rep. 850; Addington v. Etheridge, 12 Gratt. 436; Garland v. Rives, 4 Rand. 282; Wright v. Hencock, 3 Munf. 521; Mitchell v. Sawyer, 115 Ill. 650; David v. Birchard, 53 Wisc. 492; Schmidt v. Opie, 33 N. J. Eq. 138; Crowninshield v. Kittredge, 7 Met. 520.

³ Billing v. Russell, 101 N. Y. 226; reversing Billings v. Billings, 31 Hun 65; Foster v. Grigsby, 1 Bush 86; Byrd v. Bradley, 2 B. Mon. 239; Shores v. Doherty

65 Wisc. 153; Stebbins v. Miller, 12 Allen 591.

 4 Ries v. Rowland, 4 McCrary, C. C., 85; Young v. Heermans, 66 N. Y. 374; Dean v. Skinner, 42 Iowa 418.

- 5 Barber $\it r.$ Terrell, 54 Ga. 146; Menton $\it v.$ Adams, 49 Cal. 620; Sims $\it v.$ Gaines, 64 Ala. 392.
- 6 Shoemaker v. Hastings, 61 How. Pr. 79; Sterling v. Van Cleve, 7 Halst. (12 N. J. L.) 285; Low v. Carter, 21 N. H. 433.
- 7 Donovan
r. Dunning, 69 Mo. 436; Harrell v. Mitchell, 61 Ala. 270; Oriental Bank v. Haskins, 3
 Met. 332.
- 8 Lukins r. Aird, 6 Wallace 78; Todd v. Monell, 19 Hun 362; Hart v. McFarland, 13 Penn. St. 182; McCulloch v. Hutchinson, 7 Watts 434; Shaffer v. Watkins, 7 Watts & S. 219; Strong v. Lawrence, 58 Iowa 55.
- ⁹ Knapp v. McGowan, 96 N. Y. 75; Hindman v. Dill, 11 Ala. 689; Johnson v. Cunningham, 1 Ala. 249; Austin v. Johnson, 7 Humph. 191; Ely v. Hair, 16
 B. Mon. 230; Stiles v. Hill, 62 Tex. 429; Beach v. Bestor, 47 Ill. 521.

because the grantor, rightly or wrongly, expected a reconveyance to him or for his benefit, there being no fraudulent understanding between himself and the grantee.¹

It is a general rule that any conveyance which is fraudulent as to a part of the property transferred,² or which is made upon a consideration partly fraudulent,³ is wholly void as to the grantor's creditors. But the validity of a conveyance as against creditors, where the parts are severable, cannot depend upon this test.⁴ If it is made for the payment or security of several debts, some valid and the others fraudulent, it will be avoided as to the latter, but sustained as to the former, in the absence of any fraud on the part of those beneficiaries.⁵

There cannot be as against creditors a fraudulent conveyance of that which they could in no manner have reached; and accordingly they cannot avoid a conveyance of any property which was exempt from their seizure, irrespective of either the motive or the consideration of the transfer.⁶ And in the absence of a fraud on the exemption laws the proceeds of exempted property and gifts of property purchased with such proceeds are similarly protected.⁷ But as soon as the exemption is determined, either by the cessation of the statutory

 $^{^1}$ Baldwin v. Rogers, 28 Minn. 544; Hovey v. Holcomb, 11 Ill. 660; Cureton v. Doby, 10 Rich. Eq. 411.

² Russell v. Winne, 37 N. Y. 591; Mackie v. Cairns, 5 Cow. 547; Harman v. Hoskins, 56 Miss. 142; Tickner v. Wiswall, 9 Ala. 305; Swinford v. Rogers, 23 Cal. 233.

 $^{^3}$ Hall v. Heydon, 41 Ala. 242; Holt v. Creamer, 34 N. J. Eq. 181; King v. Hubbell, 42 Mich. 597.

⁴ See Albee v. Webster, 16 N. H. 362; Shurtleff v. Willard, 19 Pick. 202.

⁵ Morris v. Pearson, 79 Nor. Car. 253; Livesay v. Beard, 22 W. Va. 585; Prince v. Shepard, 9 Pick. 176; Chase v. Walker, 26 Maine 555; Appleton Bank v. Bertschky, 52 Wisc. 438; Troustine v. Lask, 4 Baxter 162.

⁶ O'Conner v. Ward, 60 Miss. 1025; Burns v. Bangert, 92 Mo. 167; Davis v. Land, 88 Mo. 436; Lishy v. Perry, 6 Bush 515; Anthony v. Wade. 1 Bush 110; Winchester v. Gaddy, 72 Nor. Car. 115; Foster v. McGregor, 11 Vt. 595; Mannan v. Merritt, 11 Allen 582; Rayner v. Whicher, 6 Allen 202; Legro v. Lord, 10 Mc. 161; Rhead v. Honson, 46 Mich. 243; Smith v. Rumsey, 33 Mich. 183; Carhart v. Harshaw, 45 Wisc. 340; Hibben v. Soyer, 33 Wisc. 319; Aultman v. Heiney, 59 Iowa 654; Delashmut v. Trau, 44 Iowa 613; Furman v. Tenny, 28 Minn. 77; Baldwin v. Rogers, Id. 544; Ferguson v. Kumler, 27 Minn. 156; Boggs v. Thompson, 13 Neb. 403; Derby v. Weyrich, 8 Neb. 174; Hixon v. George, 18 Kans. 253; Dearman v. Dearman, 4 Ala. 521; Stanley v. Snyder, 43 Ark. 429; Cox v. Shropshire, 25 Tex. 113.

⁷ Pulte v. Geller, 47 Mich. 560; Monroe v. May, 9 Kans. 466; Allen v. Perry, 56 Wisc. 178; Officer v. Evans, 48 Iowa 557; Faurote v. Carr, 108 Ind. 123; Flask v. Tindall, 39 Ark. 571.

use or by the decease of the privileged owner, the conveyance, if fraudulent, may be avoided by those having the rights of creditors. And a debtor may, if he acts in good faith, pay for exempt with non-exempt property.

Relief against a fraudulent conveyance is afforded not only to creditors strictly so called, but to all who have any cause of action, whether in contract or in tort, which the grantor seeks to evade.⁴ Plaintiffs in actions for slander or any other tort,⁵ in ejectment,⁶ for breach of promise of marriage,⁷ for forfeitures of any kind,⁸ the representatives of a deceased partner,⁹ creditors holding merely contingent claims,¹⁰ creditors whose demands have been satisfied of record by a levy which has afterwards been avoided,¹¹ libellants to whom alimony has been decreed,¹² the holder of a judgment merely for costs,¹³ the holder of a mechanic's lien,¹⁴ are all, when they have recovered judgment,¹⁵ protected against conveyances made for the purpose of defrauding them. A surety, though not entitled to

- ¹ Fellows v. Lewis, 65 Ala. 343; Martin v. Crosby, 11 Lea 198; Stevenson v. White, 5 Allen 148; Nash v. Farrington, 4 Allen 157; Cox v. Shropshire, 25 Tex. 113; Piper v. Johnston, 12 Minn. 60; Chambers v. Sallie, 29 Ark. 407.
- ² Pratt v. Burr, 5 Biss. 36; Brackett v. Watkins, 21 Wend. 68; Rose v. Sharpless, 33 Gratt. 153; Riddell v. Shirley, 5 Cal. 488.
- ³ Henkel in re, 2 Sawyer 305; Tucker v. Drake, 11 Allen 145; O'Donnell v. Segar, 25 Mich. 367; Clipperly v. Rhodes, 53 Ill. 346; North v. Shearn, 15 Tex. 174; Randall v. Buffington, 10 Cal. 491.
- Welde v. Scotten, 59 Md. 72; Gebhart v. Merfield, 51 Md. 322; Whitfield v. Whitfield, 40 Miss. 352; Fox v. Hills, 1 Conn. 295.
- ⁵ Tobie & Clark Mfg. Co. v. Waldron, 75 Me. 472; Scott v. Hartman, 26 N. J. Eq. 89; Cooke v. Cooke, 43 Md. 522; Greer v. Wright, 6 Grattan 154; Westmoreland v. Powell, 59 Ga. 256; Hunsington v. Hofer, 110 Ind. 390; Shean v. Shay, 42 Ind. 375; Bongard v. Block, 81 Ill. 186; Vance v. Smith, 2 Heisk. 343; Farnsworth v. Bell, 5 Sneed 531.
 - ⁶ Wilcox v. Fitch, 20 Johns. 472.
- ⁷ Burton v. Mill, 78 Va. 468; McVeigh v. Ritenour, 40 Ohio St. 107; Smith v. Culbertson, 9 Rich. Law 106; Hoffman v. Junk, 51 Wisc. 613.
 - ⁸ Heath v. Page, 63 Penn. St. 108; State v. Fife, 2 Bailey Law 337.
 - 9 Alston v. Rowles, 13 Fla. 117.
- McLaughlin v. Potomac Bank, 7 Howard 220; Post v. Stiger, 29 N. J. Eq. 554; Fearn v. Ward, 65 Ala. 33; Bibb v. Freeman, 59 Ala. 612; Bay v. Cook, 31 Ill. 336; Shontz v. Brown, 27 Penn St. 123.
 - ¹¹ Plimpton v. Goodell, 143 Mass. 365.
- ¹² Green v. Adams, 59 Vt. 602; Foster v. Foster, 130 Mass. 189; Bailey v. Bailey, 61 Me. 361; Morrison v. Morrison, 49 N. H. 69; Nix v. Nix, 10 Heisk. 546; Boils v. Boils, 1 Coldw. 284; Bougslough v. Bougslough, 68 Penn. St. 495; Feigley v. Feigley, 7 Md. 537; Twell v. Twell, 6 Mont. 19.
 - 13 Stevens v. Works, 81 Ind. 445. 14 Hulsman v. Whitman, 109 Mass. 411.
 - ¹⁵ Hill v. Bowman, 35 Mich. 191.

relief until held to payment, 1 is regarded as a creditor of the principal debtor from the beginning of the suretyship.2 The distributees of an estate are creditors of the administrator from the time of his appointment and receipt of the fund;3 and the rights of the creditor, though not usually to be enforced until the maturity of his demand,4 accrue from the date of the creation of the obligation 5 or the commission of the tort.6 The indorsement or assignment of a demand,7 or the fact that the form of the obligation has been changed by novation or otherwise,8 no different liability being created,9 will not diminish the rights of the holder of the claim. But in all these cases the fraudulent intent of the grantor must be shown. 10 The production of a judgment against the alleged fraudulent grantor is primâ facie evidence of the indebtedness, 11 but is not conclusive against his grantee. 12 Creditors are so far favored by the courts as to afford to them every facility to

¹ Neilson v. Williams, 42 N. J. Eq. 291; Williams v. Tipton, 5 Humph. 66.

- ² Keel v. Larkin, 72 Ala. 493; Greene v. Starnes, 1 Heisk. 582; Highland v. Highland, 5 W. Va. 63; Hurdt v. Courtenay, 4 Met. (Ky.) 139; Sargent v. Salmond, 27 Me. 539.
- 3 Anderson v. Anderson, 64 Ala. 403; McLemore v. Nuckolls, 37 Ala. 662; Soden v. Soden, 34 N. J. Eq. 115.
 - ⁴ Collins v. Nelson, 81 Ind. 75.
- ⁵ United States v. Stiner, 8 Blatchf., C. C., 544; Young v. Heermans, 66 N. Y. 374; Thompson v. Thompson, 19 Me. 244; Parsons v. McKnight, 8 N. H. 35; Williams v. Banks, 11 Md. 198 and 19 Md. 22; Hatfield v. Merod, 82 Ill. 113; Boies v. Henney, 32 Ill. 130; Stone v. Myers, 9 Minn. 303; Ridout v. Williams, 7 Lea 59; Anderson v. Anderson, 64 Ala. 403; Raymond v. Cook, 31 Tex. 373.
- ⁶ Farnsworth v. Bell, 5 Sneed 531; Langford v. Fly, 7 Humph. 585; Miller v. Dayton, 47 Iowa 312.
- ⁷ Mann v. Ruby, 102 Ill. 348; Sutton v. Hasey, 58 Wisc. 556; Warren v. Williams, 52 Me. 343; Cramer v. Reford, 17 N. J. Eq. 367; Cook v. Ligon, 54 Miss, 652; Primrose v. Browning, 56 Ga. 369.
- 8 Chandler v. Von Roeder, 24 Howard 224; Lee v. Hollister, 5 Fed. Rep. 752; Sanborn v. Kittredge, 20 Vt. 632; Stout v. Stout, 77 Ind. 537; Gardner v. Baker, 25 Iowa 343; Lowry v. Fisher, 2 Bush 70; Thomson v. Hester, 55 Miss. 656.
 - 9 Bank v. Marchand, 2 T. U. P. Charlt. 247.
- ¹⁰ Janvrin v. Janvrin, 60 N. H. 169; Plimpton v. Goodell, 143 Mass. 365; Hall v. Moriarty, 57 Mich. 345.
- ¹¹ Goodnow v. Smith, 97 Mass. 69; Reed v. Davis, 5 Pick. 388; Law v. Payson, 32 Me. 521; Vogt v. Ticknor, 48 N. H. 242; Clayton v. Brown, 30 Ga. 490; Clark v. Anthony, 31 Ark. 546.
- Mattingly v. Nye, 8 Wallace 370; Miller v. Miller, 23 Me. 22; Boutwell v.
 McClure, 30 Vt. 674; Warner v. Dove, 33 Md. 579; McDowell v. Goldsmith, 24
 Md. 214; Prescott v. Hayes, 43 N. H. 593; Posten v. Posten, 4 Whart. 27; Teed v. Valentine, 65 N. Y. 471; Edmunds v. Mister, 58 Miss. 765; Hartman v. Weiland, 36 Minn. 223; Bruggerman v. Hoerr, 7 Minn. 337.

detect and annul all efforts to defraud them of their just demands; ¹ but merely nominal creditors, ² creditors whose claims rest only upon an illegal consideration, ³ and those who are otherwise amply secured, ⁴ will not be allowed to avoid even a fraudulent conveyance. In one case, ⁵ a purchaser at a sheriff's sale, who sought to set aside an alleged fraudulent conveyance in order that he might hold property worth \$3500 on a deed which had cost him only \$171, was refused redress, it appearing that his success would defeat two other claims, equally just, for much larger amounts; and the voluntary conveyance of a merely worthless equity of redemption has been sustained. ⁶

Secret conveyances on the eve of marriage in fraud of the rights of the intended wife or husband may be avoided by the aggrieved party. But if they are made openly and bonâ fide and not in fraud of the property rights of the other party, or if they are made with the knowledge and consent of the other party, they are valid. The wife's ante-nuptial conveyance of her property for the purpose of protecting it from the creditors of her intended husband cannot be avoided by them, for they have no interest in it when so conveyed, but may be set aside by her own creditors if fraudulent against them. 10

Unless an actual fraudulent intent is shown, only those who

- ¹ Hood v. Perry, 75 Ga. 310; Oliver v. Victor, 74 Ga. 543.
- ² Esty v. Long, 41 N. H. 103; Baker v. Gilman, 52 Barb. 26; Townsend v. Tuttle, 28 N. J. Eq. 449; Warren v. Hall, 6 Dana 450; Hamburger v. Grant, 8 Oregon 181.
- ³ Winans v. Graves, 43 N. J. Eq. 263; Alexander v. Gould, 1 Mass. 165; Fuller v. Bean, 30 N. H. 181; Hanson v. Power, 8 Dana 91; Caswell v. Caswell, 28 Mo. 232; Bruggerman v. Hoerr, 7 Minn. 337.
 - ⁴ Christopher v. Christopher, 64 Md. 583.
 - ⁵ Robinson v. Frankville Church, 59 Iowa 717.
 - ⁶ Mittelburg v. Harrison, 90 Mo. 444.
- ⁷ Tucker v. Andrews, 13 Me. 124; Waller v. Armistead, 2 Leigh 11; Manes v. Durant, 2 Rich. Eq. 404; Ramsay v. Joyce, 1 McMull. Eq. 236; Petty v. Petty, 4 B. Mon. 215; Black v. Jones, 1 A. K. Marsh. 312; Youngs v. Carter, 17 N. Y. Supreme Ct. 194; S. C., 50 How. Pr. 410; Thayer v. Thayer, 14 Vt. 107; Smith v. Smith, 6 N. J. Eq. 515.
- ⁸ Jones v. Roberts, 65 Me. 273; Holmes v. Holmes, 3 Paige 363; Land v. Jeffries, 5 Rand. 211; Tate v. Tate, 1 Dev. & Bat. Eq. 22; McClure v. Miller, 1 Bailey Eq. 107; Cameron v. Cameron, 10 Sm. & M. 394; Hamilton v. Smith, 57 Iowa 15.
- ⁹ Land v. Jeffries, 5 Rand. 211, 599; Prior v. Kinney, 6 Munf. 510; Andrews v. Jones, 10 Ala. 400; Commonwealth v. Fletcher, 6 Bush 171.
- 10 Hamlin v. Bridge, 24 Me. 145; Dickson v. Miller, 19 Miss. 594. See Vanderheyden r. Mallory, 1 N. Y. 452.

were at the time creditors of one conveying his property can deny the validity of the transfer.¹ Even a voluntary conveyance from husband to wife will be sustained against his subsequent creditors, unless it appears to have been made with the purpose of contracting debts and avoiding their payment.² So, a voluntary conveyance of property in trust for the future support of the grantor is, under the same circumstances, valid against his subsequent creditors;³ and the same protection will be given to a settlement made merely in consideration of blood and affection,⁴ or upon any good but not valuable consideration,⁵ or even to a purely voluntary conveyance.⁶ A subsequent creditor, to avoid his debtor's conveyance, must show an intent to defraud subsequent creditors by means of the conveyance, that the conveyance was made as a cover for future schemes of fraud.⊓ It has been well said that no voluntary conveyance

- ¹ Hinde v. Longworth, 11 Wheaton 199; Hall v. Sands, 52 Me. 355; Thacher v. Phinney, 7 Allen 146; Converse v. Hartley, 31 Conn. 372; Dygert v. Remerschnider, 32 N. Y. 629; Phillips v. Zerbe Run Co., 25 Penn. St. 56; Ward v. Hollins, 14 Md. 158; South Carolina Bank v. Ballard, 12 Richards 259; Enders v. Williams, 1 Met. (Ky.) 346; Keeler v. Ullrich, 32 Mich. 88; Wooldridge v. Gage, 68 Ill. 157; Douley v. McKiernan, 62 Ala. 34; Cole v. Varner, 31 Ala. 244; Stone v. Myers, 9 Minn. 303; Partee v. Mathews, 53 Miss. 140; Clark v. Anthony, 31 Ark. 546; De Garcia v. Galvan, 55 Tex. 53.
- ² Hilton v. Morse, 75 Me. 258; Gilligan v. Lord, 51 Conn. 562; Phœnix Bank v. Stafford, 89 N. Y. 405; Thompson v. Allen, 103 Penn. St. 44; Brown v. Spivey, 53 Ga. 155; Kellogg v. Hale, 108 Ill. 164; Durand v.Weightman, Id. 489; Lucas v. Lucas, 103 Ill. 121; Crawford v. Logan, 97 Ill. 396; Phillips v. North, 77 Ill. 243; Vance v. Smith, 2 Heisk. 343; Owen v. Owen, 5 Humph. 352; Studabaker v. Langard, 79 Ind. 320; Boatmen's Savings Bank v. Overall, 90 Mo. 410; Bullitt v. Taylor, 34 Miss. 708; Lloyd v. Bunce, 41 Iowa 660; Whitescarver v. Bonney, 9 Iowa 480; Sanders v. Chandler, 26 Minn. 273; Sanderson v. Streeter, 14 Kans. 458; Kane v. Desmond, 63 Cal. 464; Wells v. Stout, 9 Cal. 479; Sexton v. Wheaton, 8 Wheat, 229.
- ³ Mathews v. Jordan, 88 Ill. 602; Preston v. Jones, 50 Penn. St. 54; Buchanan v. Clark, 28 Vt. 799.
- ⁴ Mattingly v. Nye, 8 Wallace 370; Herring v. Richards, 1 McCrary, C. C., 570; Bennett v. Bedford Bank, 11 Mass. 421; Parker v. Proctor, 9 Mass. 390; Teed v. Valentine, 65 N. Y. 471; Welles v. Cole, 6 Grattan 645; Smith v. Smith, 24 So. Car. 304; Webb v. Roff, 9 Ohio St. 430; Nicholas v. Ward, 1 Head 323; Martin v. Olliver, 9 Humph. 561.
- ⁵ Brackett v. Waite, 4 Vt. 389; Dunham v. Pitkin, 53 Mich. 504; Tunison v. Chamblin, 88 Ill. 378; Eaton v. Perry, 29 Mo. 96.
- ⁶ Beal v. Warren, 2 Gray 447; Lormore v. Campbell, 60 Barb. 62; Rose v. Brown, 11 W. Va. 122; Lockhard v. Beckley, 10 Id. 87; Jackson v. Miner, 101 Ill. 550; Kirksey v. Snedecor, 60 Ala. 192; Edmunds v. Mister, 58 Miss. 765.
- 7 Horbach v. Hill, 112 U. S. 144; Laughton v. Harden, 68 Me. 208; Kimble v. Smith, 95 Penn. St. 69; Harlan v. Maglaughlin, 90 Id. 293; Toole v. Darden, 6 Ired. Eq. 394; Walker v. Bollman, 22 So. Car. 512; C., B. & Q. R. Co. v. Wat-

can be made which will not in certain contingencies tend to put property beyond the reach of the grantor's creditors; 1 and the happening of such contingencies may reasonably be supposed to be within the contemplation of every one who does not intend to withdraw himself from the active pursuits of life.2 But such a conveyance is not for that reason void against subsequent creditors, unless it is also shown to have been made with a design to defraud them by incurring debts and avoiding their payment.3 If the subsequent creditor had notice of the conveyance before the indebtedness to him was contracted, he could not commonly claim to have been defrauded thereby; 4 and the grantor's payment of any prior indebtedness is to be considered in determining his intent,5 though of course the payment of prior debts at the expense of subsequent creditors will not make a fraudulent conveyance valid against the latter.⁶ A plaintiff who includes in the same judgment prior and subsequent demands can claim the rights only of a subsequent creditor. A creditor who has been allowed to obtain judgment on a debt discharged by bankruptcy cannot avoid, as fraudulent against him, a conveyance made by the debtor before the judgment.8 If, however, a debtor makes a conveyance with the actual purpose of defrauding either pres-

son, 113 Ill. 195; Ruffing v. Tilton, 12 Ind. 259; Lynch v. Raleigh, 3 Ind. 273; Lyman v. Cessford, 15 Iowa 229; Ziekel v. Douglass, 88 Mo. 382; Horn v. Volcano Co., 13 Cal. 62; Crawford v. Beard, 12 Oregon 447; Meche v. Lalamie, 30 La. An., Pt. II., 1136.

 1 Killian v. Clark, 3 McArthur 379; Doe v. McKinney, 5 Ala. 719; Abbott v. Hurd, 7 Blackf. 510.

 2 Mullen v. Wilson, 44 Penn. St. 413; Zerbe v. Miller, 16 Id. 488; Ashmead v. Hean, 13 Id. 584; Thomson v. Dougherty, 12 Serg. & R. 448; Moore v. Blondheim, 19 Md. 172; Hurdt v. Courtenay, 4 Met. (Ky.) 139.

⁸ Winchester v. Charter, 12 Allen 606; Graham v. La Crosse R. Co., 102 U. S. 148; Rankin v. Arndt, 44 Barb. 251; Snyder v. Christ, 39 Penn. St. 499; Reinheimer v. Hemingway, 35 Id. 432; Hollinshead v. Allen, 17 Id. 275; Kane v. Roberts, 40 Md. 590; Gordon v. McIlwain, 82 Ala. 247; Stiles v. Lightfoot, 26 Ala. 443.

⁴ Smith v. Gaylord, 47 Conn. 380; Baker v. Gilman, 52 Barb. 26; Monroe v. Smith, 79 Penn. St. 459; Hanson v. Power, 8 Dana 91; Sheppard v. Thomas, 24 Kans. 780; Givens v. Branford, 2 McCord 152.

⁵ Winchester v. Charter, 97 Mass. 140; Freeman v. Burnham, 36 Conn. 469; Claflin v. Mess, 30 N. J. Eq. 211; Toney v. McGehee, 38 Ark. 419.

⁶ Savage v. Murphy, 34 N. Y. 508; Wilbur v. Fradenburgh, 52 Barb. 474; Paulk v. Cooke, 39 Conn. 566; Brown v. McDonald, 1 Hill Eq. 297; Churchill v. Wells, 7 Coldw. 364; Barhydt v. Perry, 57 Iowa 416.

⁷ Quimby v. Dill, 40 Me. 528; Baker v. Gilman, 52 Barb. 26.

⁸ Hodges v. Taylor, 57 Tex. 196.

ent or future creditors, the conveyance being voluntary 1 or the debtor's fraudulent purpose being participated in by the grantee, it may be impeached by either class of creditors, or by an assignee in bankruptcy or insolvency, who represents both classes; 2 and the debtor's intent in making the conveyance must be determined as a question of fact.3 Any conveyance made with a view to future indebtedness, for the purpose of putting the property beyond the reach of future creditors, will be fraudulent as against them. So any conveyance made upon a secret trust for the benefit of the grantor, with the actual intent of hindering creditors, may be avoided by subsequent as well as by prior creditors; 5 and as a general rule any deed which is fraudulent as to existing creditors may be avoided by creditors whose demands have accrued subsequently to the conveyance,6 though this rule is not universally adopted.⁷ A judgment knowingly and purposely taken for more than is due is wholly void against junior attaching creditors of the same debtor,8 and its holder will not be aided

¹ Redfield v. Buck, 35 Conn. 328; Parkman v. Welch, 19 Pick. 231; Damon v. Bryant, 2 Pick. 411; Bennett v. Bedford Bank, 11 Mass. 421; Reade ∗v. Livingston, 3 Johns. Ch. 481; Chase v. McCay, 21 La. An. 195; Grimes v. Russell, 45 Mo. 431; Wilcoxen v. Morgan, 2 Col. 473.

 2 Dodd v. Adams, 125 Mass. 398; Blanchard v. McKey, Id. 124; Day v. Cooley, 118 Mass. 524; Wadsworth v. Williams, 100 Mass. 126; Shand v. Hanley, 71 N. Y. 319; Pratt v. Cox, 22 Gratt. 330; Churchill v. Wells, 7 Coldw. 364; Harrison v. Kramer, 3 Iowa 543.

³ McLane v. Johnson, 43 Vt. 48; Seals v. Robinson, 75 Ala. 363; Hunt v. Spencer, 20 Kans. 126; Thacher v. Phinney, 7 Allen 146.

⁴ Burdick v. McGill, 2 McCrary, C. C., 486; Hawley v. Sackett, 6 Thomp. & C. 322; Carpenter v. Carpenter, 25 N. J. Eq. 194; Cramer v. Reford, 17 Id. 367; Beeckman v. Montgomery, 14 Id. 106; Matthai v. Heather, 57 Md. 483; Silverman v. Greaser, 27 W. Va. 550; Fisher v. Lewis, 69 Mo. 629.

⁵ Wyman v. Brown, 50 Me. 139; Bristol Bank v. Keavy, 128 Mass. 298; Paul v. Crooker, 8 N. H. 288; Nat'l Bank of Metropolis v. Sprague, 20 N. J. Eq. 13; Jones v. King, 86 Ill. 225; Wang v. Finnerty, 32 La. An. 94; Davis v.

Stern, 15 Id. 177.

- ⁶ Whitmore v. Woodward, 28 Me. 392; Clark v. French, 23 Me. 221; Norton v. Norton, 5 Cush. 524; Bassett v. McKenna, 52 Conn. 437; Allen v. Rundle, 50 Conn. 9; Smyth v. Carlisle, 16 N. H. 464; S. C., 17 Id. 417; McConihe v. Sawyer, 12 Id. 396; King v. Wilcox, 11 Paige 589; Wadsworth v. Havens, 3 Wend. 411; Allaire v. Day, 30 N. J. Eq. 231; Herschfeldt v. George, 6 Mich. 456; Dart v. Stewart, 17 Ind. 221; Hooker v. Mowre, 17 Iowa 195; Nichol v. Nichol, 4 Baxter 145; Hester v. Wilkinson, 6 Humph. 215; Trimble v. Turner. 13 Sm. & M. 348.
- ⁷ Hall r. Moriarty, 57 Mich. 345; Stumph r. Bruner, 89 Ind. 556; Steadman v. Hayes, 80 Mo. 319; Bucke v. Adams, Id. 504.
 - ⁸ Peirce v. Partridge, 3 Met. 44; Fairfield v. Baldwin, 12 Pick. 388.

to subject property fraudulently conveyed by the debtor; ¹ not so, if taken for too large an amount merely by an innocent mistake; ² and the levy of an execution made to hinder other creditors or with any other purpose than to effect an honest sale of the property is invalid against subsequent levies.³

The usual remedy of a creditor is by bill in equity to set aside the fraudulent transfer.⁴ To maintain such a bill, the creditor must, if he has no specific lien upon the property, first obtain judgment at law and take out execution; ⁵ before this is done, the creditor, in the absence of special statutes, ⁶ can neither interfere with the disposition of the property claimed to have been transferred in fraud of his rights by a bill in equity for an injunction or the appointment of a receiver, ⁷ nor maintain an action for damages against the parties to the fraudulent conveyance, ⁸ nor appropriate the property to himself for the satisfaction of his demand without process of law. ⁹ But it is enough if the creditor has obtained a lien upon the property, whether by judgment or otherwise. ¹⁰

¹ Sargent v. Salmond, 27 Me. 539.

² Felton v. Wadsworth, 7 Cush. 587; Clark v. Douglass, 62 Penn. St. 408.

³ Weir v. Hale, 3 Watts & S. 285; Reynolds v. Vilas, 8 Wisc. 471.

⁴ Smith v. McCann, 24 Howard 398; Hamlen v. McGillicuddy, 62 Me. 268; Beckwith v. Burroughs, 14 R. I. 366; Chase v. Searles, 45 N. H. 511; Tappan v. Evans, 11 N. H. 311; Greer v. Wright, 6 Gratt. 154; Marshall v. Marshall, 2 Bush 415; Zoll v. Soper, 75 Mo. 460; Abbey v. Commercial Bank, 31 Miss. 434; Brandon v. Gowing, 6 Rich. Eq. 5; Gormley v. Potter, 29 Ohio St. 597; Smith v. Cockrell, 66 Ala. 64; Flewellen v. Crane, 58 Ala. 627; Murphy v. Orr, 32 Ill. 489; Meux v. Anthony, 11 Ark. 411.

⁵ Adsit v. Butler, 87 N. Y. 585; Adsit v. Sanford, 23 Hun 45; Davis v. Bruns, Id. 648; Evans v. Hill, 18 Hun 464; Cramer v. Blood, 57 Barb. 155, 671; Hafner v. Irwin, 4 Ired. Law 529; Verner v. Downs, 13 So. Car. 449; Stephens v. Whitehead, 75 Ga. 294; Napper v. Yager, 79 Ky. 241; Meissner v. Meissner, 68 Wisc. 336; Goembel v. Arnett, 100 Ill. 34; Weis v. Tiernan, 91 Ill. 27; Ransom v. Schmela, 13 Neb. 73; Zimmerman v. Fitch, 28 La. An. 454.

⁶ See Quinnam v. Quinnam, 71 Me. 179; Fogg v. Lawry, Id. 215; Aiken v. Kilburne, 27 Me. 252; Barnum v. Hackett, 35 Vt. 77; Beach v. Boynton, 26 Vt. 725; Allen v. Mower, 17 Vt. 61.

⁷ Oberholser v. Greenfield, 47 Ga. 530; Barton v. Barton, 80 Ky. 212; Root v. Potter, 59 Mich. 498; Gore v. Kramer, 117 Ill. 176; Scripps v. King, 103 Ill. 469; Crowell v. Horacek, 12 Neb. 622; Weinland v. Cochran, 9 Neb. 480; Neuman v. Dreifurst, 9 Col. 228,

⁸ Tasker v. Moss, 82 Ind. 62; Murtha v. Curley, 47 N. Y. Super. Ct. 393; Lamb v. Stone, 11 Pick. 527; Moody v. Burton, 27 Me. 427.

⁹ Stewart v. Coder, 11 Penn. St. 90; Osborne v. Moss, 7 Johns. 161; Majors v. Dennis, 35 La. An. 336.

¹⁰ Smith v. Muirheid, 34 N. J. Eq. 4; Curry v. Glass, 25 Id. 108; Mechanics' Bank v. Dakin, 51 N. Y. 519; Barber v. Terrell, 54 Ga. 146; Joseph v. McGill,

Equity will make the property fraudulently transferred available to the creditor, though it be such (not being exempt) as could not be seized by an officer on execution,1 or in case the remedy is embarrassed by the decease of the debtor,2 the fraudulent grantee in that case being treated as the executor de son tort of his grantor.3 The fact that the debtor may have other property will not usually take away the creditor's right to avoid his fraudulent transfer,4 but many cases regard it as essential to aver and prove that there is no other property from which the debt can be collected,5 at least in the State in which the suit is brought,6 though allowing this to be shown either by direct evidence or by the return of nulla bona upon an execution. But it will be no defence to the debtor to show that he has other property not accessible to the process of the court out of which the debt might be paid.8 The creditor by the filing of his bill acquires an equitable lien upon the property, similar to an attachment lien,9 which has been

52 Iowa 127; Tennent v. Battey, 18 Kans. 324; McMinn v. Whelan, 27 Cal. 300.

- 1 Catchings v. Manlove, 39 Miss. 655 ; Battle v. Reid, 68 Ala. 149 ; Pulsifer v. Waterman, 73 Me. 233.
- ² Dunn v. Murt, 4 Mackey 289; Fowler's Appeal, 87 Penn. St. 449; Cleveland v. Chambliss, 64 Ga. 352; Hampson v. Sumner, 8 Ohio (Ham.) 328; Armstrong v. Croft, 3 Lea 191; Beebe v. Saulter, 87 Ill. 518; Snodgrass v. Andrews, 30 Miss. 472; Halfman v. Ellison, 51 Ala. 543; Wright v. Campbell, 27 Ark. 637.

³ Means v. Hicks, 65 Ala. 241. See Bottorff v. Covert, 90 Ind. 508; Jackson v. McNabb, 39 Ark. 111.

- 4 Gormley r. Potter, 29 Ohio St. 597; Westerman r. Westerman, 25 Id. 500; Flanagan r. Donaldson, 85 Ind. 517; Jennings r. Howard, 80 Ind. 214; Lehman r. Meyer, 67 Ala. 396; Baker r. Lyman, 53 Ga. 339; Rounds r. Green, 29 Minn. 139. See Leonard r. Forcheimer, 49 Ala. 145.
- ⁵ Preston r. Colby, 117 Ill. 477; Simpkins r. Smith, 94 Ind. 470; Willis r. Thompson, 93 Ind. 62; Eve r. Louis, 91 Ind. 457; Moore r. Lampton, 80 Ind. 301; Pfeifer r. Snyder, 72 Ind. 78; Harlen r. Watson, 63 Ind. 143; Bird r. Bolduc, 1 Mo. 701; Emery r. Yount, 7 Col. 107; Harris r. Taylor, 15 Cal. 348; Hart r. Bowie, 34 La. An. 323.
 - ⁶ Alford v. Baker, 53 Ind. 279.
- 7 King v. Clarke, 2 Hill Eq. 611; Adams v. Slate, 87 Ind. 573; Lee v. Lee, 77 Ind. 251; Bruker v. Kelsey, 72 Ind. 51; Gwyer v. Figgins, 37 Iowa 517; Page v. Grant, 9 Oregon 116.
 - 8 Eiler v. Crull, 112 Ind. 318.
- ⁹ Chittenden v. Brewster, 2 Wallace 191; Scoville v. Shed, 36 Hun 165; Evans v. Welch, 63 Ala. 250; McKinney v. Farmers' Bank, 104 Ill. 180; Wallace v. Treakle, 27 Gratt. 479; Young v. Gillespie, 12 Heisk. 239; Maiders v. Culver, 1 Duvall 164; Cassaday v. Anderson, 53 Tex. 527.

held to be 1 and not to be 2 displaced by the subsequent bankruptcy of the debtor. Several creditors may, but need not, join in the prosecution of the same bill,3 and substantial justice will rather be regarded than the mere form of the proceeding.4 A deed fraudulent against creditors may also be avoided at law by levy upon the property; and where the remedy at law is adequate and complete, and where it has been adopted by election, that in equity is commonly denied,5 as equity will simply supplement the deficiencies of the legal remedy.6 It has been said that upon the avoidance of several voluntary conveyances by a creditor of the grantor the debt should be apportioned among the voluntary grantees in proportion as among themselves to the property which they have severally received; 7 but no such right of apportionment is usually recognized,8 unless under special circumstances;9 and the general rule is that no judgment for money shall be rendered against the fraudulent grantee who still holds the property, but that this property shall be subjected to the creditor's process and sold for his payment.10

The creditor's claim to avoid a fraudulent conveyance should be made with reasonable promptness; ¹¹ it will not be favored after the lapse of a long period, ¹² unless he can show that due

- ¹ Powers v. Raymond, 137 Mass. 483.
- ² Kimberling v. Hartley, 1 McCrary, C. C., 136.
- ⁸ Fry v. Kruse, 43 Ark. 142; Wall v. Fairley, 73 Nor. Car. 464; Comstock v. Rayford, 20 Miss. 369 and 9 Miss. 423; White's Bank v. Farthing, 101 N. Y. 344; Nix v. Dukes, 58 Tex. 96.
- ⁴ Lawson v. Alabama Warehouse Co., 73 Ala. 289; Royer Wheel Co. v. Fielding, 31 Hun 274; Watkins v. Wortman, 19 W. Va. 78; Bennett v. Stout, 98 Ill. 47; Reeves v. Sherwood, 45 Ark. 520.
- ⁵ Walker v. Powers, 104 U. S. 245; Sherman v. Davis, 137 Mass. 132; Mill River Association v. Claffin, 9 Allen 101; Taylor v. Robinson, 7 Allen 253; Drinkwater v. Drinkwater, 4 Mass. 354; Mulford v. Peterson, 35 N. J. L. 127; Cranson v. Smith, 47 Mich. 647; McMahan v. Dawkins, 22 So. Car. 314; Pettees v. Glover, 68 Ala. 417; Smith v. Cockrell, 66 Ala. 64; Henry v. Murphy, 54 Ala. 246.
 - 6 Carr v. Parker, 10 Mo. Ap. 364.
 - ⁷ Chamberlayne v. Temple, 2 Rand. 384.
 - ⁸ Wales v. Lawrence, 36 N. J. Eq. 207; Miller v. Dayton, 47 Iowa 312.
 - 9 Swihart v. Shaum, 24 Ohio St. 432.
- ¹⁰ Huntington v. Saunders, 120 U. S. 78; McLean v. Cary, 88 N. Y. 391; Van Wyck v. Baker, 17 N. Y. Supreme Ct. 39; Turner v. Vaughan, 33 Ark. 454; Barnes v. Beighly, 9 Col. 475.
 - ¹¹ Reeg v. Burnham, 55 Mich. 39; Greenman v. Greenman, 107 Ill. 404.
- Western Union Tel. Co. v. Caldwell, 141 Mass. 489; Pusey v. Gardner, 21
 W. Va. 469; Vestal v. Allen, 94 Ind. 268; Dominguez v. Dominguez, 87 Cal. 424.

diligence would not have enabled him earlier to ascertain the facts.¹ He cannot set aside a transfer in which he has, either before or after it was made, acquiesced,² especially if the grantee or others have acquired rights or made expenditures on the faith of his acquiescence.³ His receipt of the price of such a transfer, or accepting any benefit under it, will be an acquiescence in it,⁴ if made with full knowledge of the facts.⁵ But his knowledge of the fraudulent character of the conveyance will not affect his right to avoid it; ⁶ and an act equivocal in itself will not be regarded as an affirmance if it was not so intended.⁷

An ordinary creditor cannot avoid his debtor's transfer of property on the ground merely that it was in fraud of the bankrupt or insolvent law in force at the time; such a fraud can be avoided only in proceedings under that law.8 And after such proceedings have been instituted and an assignee appointed, an action to avoid the debtor's fraudulent conveyance antedating the assignment can be brought only by the assignee, who represents all the creditors, and not by any particular creditor.9 unless the latter had obtained a valid lien upon the property before the assignment.¹⁰ One who purchases from the assignee property that had been fraudulently conveyed by the debtor will succeed to the assignee's right to avoid the fraudulent transfer if the terms of the assignee's sale or his previous acts show an election to avoid it, not otherwise. 11 The assignee may set aside the debtor's conveyance, if forbidden by the statute or actually fraudulent, 12 as against all persons but a bonâ fide purchaser

¹ Underhill v. Nelson, 1 Lea 98; Shannon v. White, 6 Rich. Eq. 96.

² Barrow v. Barrow, 108 Ind. 345.

Scholey v. Worcester, 4 Hun 302; Pillsbury v. Kingon, 36 N. J. Eq. 413; Irwin v. Longworth, 20 Ohio 581; Bobb v. Woodward, 50 Mo. 95.

⁴ Kuhn v. Weil, 73 Mo. 213; Gutzwileer v. Lackman, 23 Mo. 168; Furness v. Ewing, 2 Penn. St. 479; Potter v. Belden, 105 Mass. 11; Hazelton v. Allen, 3 Allen 114; Snow v. Lang, 2 Allen 18; Butler v. Hildreth, 5 Met. 49.

⁵ Norton v. Norton, 5 Cush. 524.

⁶ Fitch v. Corbett, 64 Cal. 150.

⁷ Crafts v. Belden, 99 Mass. 535; Stout v. Stout, 77 Ind. 537.

8 Gardner v. Lane, 9 Allen 492; Smith v. Deidrick, 30 Minn. 60.

9 Lowe in re, 19 Fed. Rep. 589; Pratt v. Curtis, 2 Lowell 87; Swift v. Hart, 35 Hun 128 (overruling Leonard v. Bliss, 26 Hun 288); Kane v. Pilcher, 7 B. Mon. 651; Haxtun v. Corse, 2 Barb. Ch. 506; Root v. Porter, 59 Mich. 498; Angell v. Pickard, 61 Mich. 561; David v. Ferrand, 2 La. An. 596.

¹⁰ New Orleans Banking Association v. Le Breton, 4 Woods, C. C., 203; Allen

v. Montgomery, 48 Miss. 101; Rohrer's Appeal, 62 Penn. St. 498.

Freeland v. Freeland, 102 Mass. 475; Tuite r. Stevens, 98 Mass. 305; Gibbs
 Thayer, 6 Cush. 30.
 Adams v. Collier, 122 U. S. 382.

for value without notice, by action at law if there be a legal remedy,2 otherwise by bill in equity.3 He may by bill in equity compel the assignment to him by the guilty holder of a fraudulent mortgage given by the debtor, treating it as made in trust for the creditors, and keeping it alive against all parties but the fraudulent mortgagee,4 if the debtor has afterwards sold the equity of redemption.⁵ The most usual fraud against bankrupt or insolvent laws is a fraudulent preference given to some particular creditor; and to enable the assignee to avoid such a preference it is usually necessary for him to show that the debtor made the payment or transfer within the time limited by the statutes,6 being insolvent and intending to give a preference, and the preferred creditor having reasonable cause to know of the debtor's insolvency, and knowing that it was made in fraud of the provisions of the law.7 If the transaction has been otherwise completed before the beginning of the statutory period, the mere fact that possession was given and taken within that time will not be enough to avoid the transaction; 8 so with the recording or acknowledgment of a completed deed of transfer.9 The question of insolvency is one of fact; 10 in the case of people engaged in business, it means an inability to pay their debts as these become due in the ordinary course of business; in other cases, that the debtor's property is insufficient to

Buckingham v. McLean, 13 Howard 151; Bradshaw v. Klein, 2 Biss., C. C., 20; Shackleford v. Collier, 6 Bush 149.

² Metcalf v. Cady, 8 Allen 587; Pratt v. Pond, 5 Allen 59; Woodman v. Saltonstall, 7 Cush. 181; Thayer v. Smith, 9 Met. 469.

³ Sherman v. Fitch, 98 Mass. 59; Hubbell v. Currier, 10 Allen 333; Clark v. Jones, 5 Allen 379.

⁴ Bartholomew v. McKinstry, 2 Allen 448.

⁵ Burpee v. Janesville National Bank, 5 Bissell, C. C., 405.

⁶ Fuller in re, 1 Sawyer, C. C., 243; Bean v. Brookmire, 1 Dillon, C. C., 24; Hislop v. Hoover, 68 Nor. Car. 141; Ordway v. Montgomery, 10 Lea 514; Black v. Richardson, 37 La. An. 594.

<sup>Clark v. Iselin, 21 Wallace 360; Mays v. Fritton, 20 Id. 414; Toof v. Martin,
13 Id. 40; Knower v. Haines, 31 Fed. Rep. 513; Forbes v. Howe, 102 Mass. 427;
Beals v. Quinn, 101 Mass. 262; Smith v. Merrill, 9 Gray 144; Clay v. Towle, 78
Me. 86; Dow v. Sargent, 15 N. H. 115; Nicol v. Crittenden, 55 Ga. 497; Rice v. Melendy, 41 Iowa 395.</sup>

⁸ King v. Nichols, 138 Mass. 18; Mitchell v. Black, 6 Gray 100.

⁹ Gibson v. Warden, 14 Wallace 244; Cragin v. Carmichael, 2 Dillon, C. C., 519; Wynne in re, Chase 227; Folsom v. Clemence, 111 Mass. 273; Seaver v. Spink, 65 Ill. 441.

¹⁰ Clarion Bank v. Jones, 21 Wallace 325; Driggs v. Moore, 1 Abbott, U. S., 440; Pierce v. Evans, 61 Penn. St. 415.

meet all his obligations.1 If the debtor is really insolvent, ignorance of that fact on his part or an actual belief to the contrary is immaterial; 2 if in fact solvent, he must, to render his act invalid, have done it in contemplation of insolvency and with an actual fraudulent intent.3 If an insolvent debtor has just before his bankruptcy sold goods to one of his creditors expecting to be paid therefor in money, the fact that the creditor refused to pay for them but credited them on account, and thus obtained an actual preference, would not make the transaction a fraudulent preference; 4 for the debtor's intent to prefer is an essential element, and cannot be inferred contrary to his real expectation; 5 but he is presumed to intend the natural and necessary consequences of his acts,6 and the fact that there was also another motive for his payment will not make it valid if he did intend to give a forbidden preference, as for example if he made it to relieve himself from pressure by the preferred creditor.8 His mere passive non-resistance to legal proceedings brought without his request or connivance to enforce an overdue claim against which he has no just defence will not constitute a preference; but any positive act done by him with the intention and result of aiding the creditor to obtain a preference by means of a levy upon his property will satisfy the requirements of the statute; he procures his property to be seized on execution if he contributes to such a seizure; 9 and in

 $^{^1}$ Sawyer v. Turpin, 91 U. S. 114; Wilson v. City Bank, 17 Wallace 473; Wager v. Hall, 16 Wallace 584; Toof v. Martin, 13 Wallace 40; Harrison v. McLaren, 10 N. B. R. 244; Smith v. McLean, Id. 260.

 $^{^2}$ Wager v. Hall, $ubi\ supra$; Haughey v. Albin, 2 Bond 244; Rison v. Knapp, 1 Dillon 186; Warren v. Tenth National Bank, 10 Blatchf. 493; Holbrook v. Jackson, 7 Cush. 136.

 $^{^3}$ Griffith r. Cox, 79 Ky. 562; Preston v. Spaulding, 120 Ill. 208; Williams r. Cohen, 25 Md. 486.

⁴ Rice v. Grafton Mills, 117 Mass. 228.

 $^{^5}$ Wilson v. City Bank, 17 Wallace 473; Toof v. Martin, 13 Wallace 40; McKay in re, 1 Lowell 561; Bloodgood v. Beecher, 35 Conn. 469; Perkins v. Webster, 2 Cush. 480.

 $^{^6}$ Sawyer v. Turpin, 91 U. S. 114; Traders' Bank v. Campbell, 14 Wallace 87; Ahl v. Thorner, 2 Bond 287; Beattie v. Gardner, 4 Benedict 479; Driggs v. Moore, 1 Abbott U. S. 440; Morse v. Godfrey, 3 Story 364.

⁷ Rison v. Knapp, 1 Dillon 186; Forbes v. Howe, 102 Mass. 427; Denny v. Dana, 2 Cush. 160.

⁸ Clarion Bank v. Jones, 21 Wallace 325; Batchelder in re, 1 Lowell 373; Wilkinson's Appeal, 4 Penn. St. 284.

⁹ Sage v. Wyncoop, 104 U. S. 319; Rogers v. Palmer, 102 U. S. 263; National Bank v. Warren, 96 U. S. 539; Little v. Alexander, 21 Wallace 500; Wilson v.

that case the assignee may recover the property or its proceeds from the creditor thus preferred. The preferred creditor must have reasonable cause to know the debtor's insolvency; and he has this reasonable cause if he has the means of knowledge and is aware of such facts and circumstances as should excite his suspicions and lead him to avail himself of those means; 2 wilful ignorance must be regarded as equivalent to actual knowledge.3 The same rule will be applied to the requirement of knowledge in the preferred creditor that the debtor's action is in fraud of the statute.4 If the debtor has as an individual preferred a debt due to himself in a fiduciary capacity, his own knowledge is sufficient, and no notice need be brought home to his cestui que trust.5 But circumstances which would not lead to the inference sought to be drawn are not evidence of its existence.6 A debtor's payment, transfer, or conveyance made within the statutory period to any person who has reasonable cause to know that he is insolvent or acting in contemplation of insolvency, and who knows that the debtor's object is to prevent the property from coming to his assignee and being distributed according to law, is also fraudulent and voidable by his assignee.7 In each of these classes of frauds against bankruptcy or insolvency, the fact that the sale, payment, or transfer brought in question was out of the usual course of the debtor's business is primâ facie evidence of fraud therein.8

City Bank, 17 Wallace 473; Samson v. Burton, 5 Benedict 325; Sartwell v. North, 144 Mass. 188; Parsons v. Topliff, 119 Mass. 245.

- ¹ Clarion Bank v. Jones, ²1 Wallace 325; Shawhan v. Wherritt, ⁷ Howard 627; Atkinson v. Purdy, Crabbe 551; Rohrer's Appeal, 62 Penn. St. 498; Jordan v. Downey, 40 Md. 401.
- ² Buchanan v. Smith, 16 Wallace 277; Mayer v. Hermann, 10 Blatchf. 256; Warren v. Tenth National Bank, Id. 493; Otis v. Hadley, 112 Mass. 100; Beals v. Quinn, 101 Mass. 262; Pierce v. Evans, 61 Penn. St. 415.
- ³ Graham v. Stark, 3 Benedict 520; Peckham v. Burrows, 3 Story 544; Scammon v. Cole, 5 N. B. R. 257; Goldsworthy v. Roger Williams Bank, 15 R. I. 586.
- ⁴ Hamlin v. Pettibone, 6 Bissell 167; Gattman v. Houla, 12 N. B. R. 493; Buchanan v. Goss, 13 Id. 337; Otis v. Hadley, 112 Mass. 100.
 - ⁵ Bush v. Moore, 133 Mass. 198.
- ⁶ Rankin v. Third National Bank, 14 N. B. R. 4; Castle v. Lee, 11 Id. 80; Kemmerer v. Tool, 78 Penn. St. 147.
- ⁷ Gibson v. Warden, 14 Wallace 244; Tiffany v. Lucas, 15 Wallace 410; Babbitt v. Walbrun, 1 Dillon 19; Andrews v. Graves, Id. 108; Goodrich v. Wilson, 119 Mass. 429.
- ⁸ Walbrun v. Babbitt, 16 Wallace 577; Rison v. Knapp, 1 Dillon 186; Judson v. Kelty, 5 Benedict 348; Butler in re, 1 Lowell 506; Parsons v. Topliff, 119
 Mass. 245; Otis v. Hadley, 112 Mass. 100; Tapley v. Forbes, 2 Allen 20.

An assignment for the benefit of creditors, if intended or tending to hinder and delay them, is fraudulent and void as against them, though valid as to parties who have assented to it.2 And although it has been held that such an assignment can be set aside only upon proof both of fraud by the assignor and of participation therein by the assignee,3 yet it is generally considered that, once it is shown to have been fraudulent on the part of the debtor, it cannot be saved from condemnation by the innocence of the assignee or trustee and of the creditors who are made its beneficiaries, but who have given no new consideration for its execution.4 An assignment void upon its face cannot be sustained by parol evidence that the vicious provisions were inserted for the real benefit of the creditors.5 The debtor's reservation of any benefit to be derived to himself out of the assigned property is evidence of a fraudulent intent on his part.6 It was said in a well considered case 7 that he may in good faith convey his property or a part of it 8 for the payment of his debts, may designate the beneficiaries by name, may postpone for a reasonable time the period for executing the provisions of the deed, and may prescribe the order in which the creditors are to be paid; but he cannot divide his property into two parts, and protect himself in the enjoyment of the one by giving up the other,9 or require his creditors to accept the one part and aban-

¹ Bodley v. Goodrich, 7 Howard 276; Sheldon v. Dodge, 4 Denio 218; Work v. Ellis, 50 Barb. 512; Brinks v. Heise, 84 Penn. St. 246; Foley v. Bitter, 34 Md. 646; Burr v. Clement, 9 Col. 1.

² Therasson v. Hickok, 37 Vt. 454; Hone v. Henriquez, 13 Wend. 240; Johns v. Bolton, 12 Penn. St. 339; Richardson v. Rogers, 45 Mich. 591; Martin v. Maddox, 24 Mo. 575; Geisse v. Beall, 3 Wisc. 367; Bellamy v. Bellamy, 4 Fla. 242.

 $^{^3}$ Wilson v. Eifler, 7 Coldw. 31; State v. Keeler, 49 Mo. 548; Gates v. Labeaume, 19 Mo. 17; Hollister v. Loud, 2 Mich. 309.

⁴ Savage v. Knight, 92 Nor. Car. 493; Stickney v. Crane, 35 Vt. 89; Rathburn v. Platner, 18 Barb. 272; Foley v. Bitter, 34 Mo. 646; Flanigan v. Lampman, 12 Mich. 58.

⁵ Inloes v. American Bank, 11 Md. 173.

⁶ Haydock v. Coope, 53 N. Y. 68; Mackie v. Cairns, 5 Cow. 547; Hoopes v. Knell, 31 Md. 550; Cheatham v. Hawkins, 76 Nor. Car. 335; Henderson v. Downing, 24 Miss. 106; Green v. Branch Bank, 33 Ala. 643; Clark v. Robbins, 8 Kans. 574.

⁷ Quarles v. Kerr, 14 Grattan 48.

⁸ See Phippen v. Durham, 8 Gratt. 457; Knight v. Waterman, 36 Penn. St. 258; Carpenter v. Underwood, 19 N. Y. 520.

 $^{^9}$ Pierce v. Jackson, 2 R. I. 35; Gadsden v. Carson, 9 Rich. Eq. 252; Le Prince v. Guillemot, 1 Id. 187; Browning v. Hart, 6 Barb. 91.

don their rights to the other.¹ So assignments have been held to be fraudulent and void which, after providing for certain specified creditors, direct, either expressly or by implication, that any surplus be returned to the assignor, leaving his other creditors wholly unprovided for.² But assignments will not necessarily be avoided by the reasonable reservations of small sums of money, stipulations for the employment of the debtor by the assignee, or for the debtor's retention of possession until the assignee may sell or may desire to take possession,³ or because made and preferences given by reason of the debtor's hope thus to escape criminal prosecution.⁴ An immediate change of possession of the assigned property is not necessary;⁵ but the assignor's long continued possession is a badge of fraud.⁶

There is no uniform rule as to the effect in an assignment for the benefit of creditors of a stipulation for a release of the debtor as a condition of taking any benefit under the deed. In Alabama, after a series of variant decisions, it has been declared by statute that assignments containing such provisions are fraudulent and void. There is a statute of like effect in California; and a similar rule prevails in Colorado, Connecticut, Florida, Georgia, Illinois, Illinois, North Carolina, and

- 2 Dana v. Lull, 17 Vt. 390; Strong v. Skinner, 4 Barb. 546; Leitch v. Hollister, 4 N. H. 211.
- ³ Canal Bank v. Cox, 6 Me. 395; Skipwith v. Cunningham, 8 Leigh 271; Rindskoff v. Guggenheim, 3 Coldw. 284; Planters' Bank v. Clarke, 7 Ala. 765; Baxter v. Wheeler, 9 Pick. 21; Frank v. Robinson, 96 Nor. Car. 28.
 - ⁴ Marbury v. Brooks, 7 Wheat. 557; Brooks v. Marbury, 11 Wheat. 79.
- Moore v. Smith, 35 Vt. 644; Scott v. Ray, 18 Pick. 360; State v. Benoist, 37 Mo. 500; Walters v. Whitlock, 9 Fla. 86.
- ⁶ Livermore v. Northrup, 44 N. Y. 107; Mead v. Phillips, 1 Sandf. Ch. 83; Hower v. Geesaman, 17 Serg. & R. 251; Higby v. Ayres, 14 Kans. 331.
- ⁷ See Rankin v. Lodor, 21 Ala. 380; West v. Snodgrass, 17 Ala. 549; Grimshaw v. Walker, 12 Ala. 101; Smith v. Leavitts, 10 Ala. 92; Wiswall v. Ticknor, 6 Ala. 179; Robinson v. Rapelye, 2 Stewart 86.
 - ⁸ Alabama Code, 1876, § 2125.

 ⁹ Civil Code, § 3457.
 - ¹⁰ Campbell v. Colorado Coal Co., 9 Col. 60; Duggan v. Bliss, 4 Col. 223.
 - ¹¹ Ingraham v. Wheeler, 6 Conn. 277; Gen. Stats. (1875), p. 378.
 - ¹² Greeley v. Dixon, 21 Fla. 413.
- ¹³ Johnson v. Farnum, 56 Ga. 144; Francis v. Herz, 55 Ga. 249; Cohen v. Summers, 54 Ga. 501; McBride v. Bohanan, 50 Ga. 527; Miller v. Conklin, 17 Ga. 430.
- ¹⁴ Hardin v. Osborn, 60 Ill. 93; Conkling v. Carson, 11 Ill. 503; Howell v. Edgar, 3 Scammon 417.
- McFarland v. Birdsall, 14 Ind. 126; Butler v. Jaffray, 12 Ind. 504; Henderson v. Bliss, 8 Ind. 100.
 Hafner v. Irwin, 1 Ired. Law 490.

 $^{^1}$ Elias v. Farley, 3 Keyes 398; Citizens' Ins. Co. v. Wallis, 23 Md. 173; Bridges v. Hindes, 16 Md. 101; Barnitz v. Rice, 14 Md. 24.

Ohio.¹ In Delaware,² Iowa,³ Kansas,⁴ Kentucky,⁵ Minnesota,⁶ Nevada,⁻ and Oregon,⁶ any general assignment must be for the benefit of all creditors. In Nebraska,⁶ such stipulations are void. In New Hampshire, though at first allowed,¹⁰ they are now considered fraudulent;¹¹ and the same is true of Pennsylvania.¹² In New York, assignments making the release of the debtor a condition of taking any benefit under the deed, or even preferring those creditors who shall release him, are held to be invalid.¹³ But a preference given to a creditor who has already released or agreed to release the debtor is valid.¹⁴ So the assignee may personally agree to obtain a release for the debtor.¹⁵ The same rule as in New York is adopted in Michigan,¹⁶ Mississippi,¹⁷ Missouri,¹³ and Tennessee.¹⁶ Such stipulations are allowed in Arkansas.²⁰ In Maine, they were at first allowed;²¹ then forbidden;²² then allowed by statute.²³ In Maryland, they are

- 1 Atkinson v. Jordan, 5 Ohio 293; Woolsey v. Urner, Wright 606; Barret v. Reed, Id. 701.
 - ² Revised Code, 1874, c. 132, § 2; Laws of 1875, c. 187.
 - ³ Iowa Code, 1873, §§ 2115 et seq.
 - ⁴ Dassler's Compiled Laws, §§ 370 et seq.
 - ⁵ Gen. Stats., 1881, p. 490.
 - 6 Gen. Stats., c. 31, §§ 23 et seq.; May v. Walker, 35 Minn. 194.
 - ⁷ Laws of 1881, c. 97, § 39.
 - ⁸ Laws of 1878, p. 36.
 - ⁹ Heelan v. Hoagland, 10 Nebraska 511.
 - 10 Haven v. Richardson, 5 N. H. 113.
 - ¹¹ Hurd v. Silsby, 10 N. H. 108.
- ¹² The earlier cases of Livingston v. Bell, 3 Watts 198; Lippincott v. Barker, 2 Binney 174; Pearpoint v. Graham, 4 Wash., C. C., 232 (followed in Brashear v. West, 7 Peters 608), have been in effect abrogated by the statute of 1849. 1 Brightley's Purdy's Digest, 10th Ed., 90.
- ¹³ Grover v. Wakeman, 11 Wend. 187; S. C., 4 Paige 23; Mills v. Levy, 2 Edw. Ch. 183; Parker, J., in Strang v. Spaulding, 38 N. Y. 12; Fullerton, J., in S. C., 37 N. Y. 139.
- 14 Spaulding $\,r.$ Strang, 38 N. Y. 9 and 37 N. Y. 135; Low $\,r.$ Graydon, 50 Barb. 414.
 - ¹⁵ Hastings v. Belknap, 1 Denio 190.
- ¹⁶ Hubbard v. McNaughton, 43 Mich. 220; Marsh v. Bennett, 5 McLean, C. C., 117.
- 17 Seale v. Vaiden, 10 Fed. Rep. 831; Mayer v. Shields, 12 Id. 789; Robins v. Embry, 1 Sm. & M. Ch. 208.
 - ¹⁸ Brown v. Knox, 6 Mo. 302; Drake v. Rogers, Id. 317.
 - ¹⁹ Wilde v. Rawlings, 1 Head 34.
 - ²⁰ Clayton v. Johnson, 36 Ark. 406.
- ²¹ Fox v. Adams, 5 Me. 245; Canal Bank v. Cox, 6 Me. 395; Todd v. Buckman, 11 Me. 41.
 - ²² Vose v. Holcomb, 31 Me. 407; The Brig Watchman, Ware 232.
 - ²³ Rev. Stats. (1871), c. 70, § 2.

sustained,1 if all the debtor's property is and purports to be assigned,2 and if non-assenting creditors are simply postponed to those who shall have released the debtor.3 In Massachusetts, the question does not appear to have been expressly decided; but the intimations of the court are in favor of the power to make such stipulations.4 In this State, the validity of all assignments honestly made depends on the assent of the creditors; 5 if there is more than enough property to satisfy the claims of those who have assented, the surplus may be reached and held by any other creditor; if there is no such surplus, the assignee will hold the property for the assenting creditors.6 A creditor's assent, once fairly obtained, cannot afterwards be retracted.7 In New Jersey, assignments are regulated by statute; and creditors who come in and take a dividend release thereby the debtor.8 In Rhode Island such stipulations are allowed,9 if there is no actual fraud; 10 and also in Vermont; 11 in South Carolina, 12 if all the debtor's property is assigned, 13 and any surplus after a partial payment is not reserved to the debtor; 14 and in Virginia. 15 In Texas, they

- ¹ McCall v. Hinckley, 4 Gill 128; Kettlewell v. Stewart, 8 Gill 472.
- ² Maughlin v. Tyler, 47 Md. 545; Coakley v. Weil, Id. 277; Loney v. Bayly, 45 Md. 447.
 - ³ Whedbee v. Stewart, 40 Md. 414; Bridges v. Woods, 16 Md. 101.
- ⁴ See Stat. 1887, c. 340. Halsey v. Whitney, 4 Mason 206; Borden v. Sumner, 4 Pick. 265; Andrews v. Ludlow, 5 Pick. 28; Nostrand v. Atwood, 19 Pick. 281; Hatch v. Smith, 5 Mass. 42.
- ⁵ Faulkner v. Hyman, 142 Mass. 53; Jones v. Tilton, 139 Mass. 418; Hewlett v. Cutler, 137 Mass. 285; Swan v. Crafts, 124 Mass. 453; Edwards v. Mitchell, 1 Gray 239; Bigelow v. Baldwin, Id. 245; Leland v. Drown, 12 Gray 437; Russell v. Woodward, 10 Pick. 408; Quincy v. Hall, 1 Pick. 357; Widgery v. Haskell, 5 Mass. 144.
- ⁶ Hewlett v. Cutter, 137 Mass. 285; Mechanics' Bank v. Eagle Refinery, 109 Mass. 38; May v. Wannemacher, 111 Mass. 202; Douglas v. Simpson, 121 Mass. 281; Everett v. Walcott, 15 Pick. 94; Foster v. Saco Mfg. Co., 12 Pick. 451; Viall v. Bliss, 9 Pick. 13.
 - ⁷ Cardany v. New England Furniture Co., 107 Mass. 116.
 - ⁸ Rev. Stats. (1878), p. 40.
- ⁹ Allen v. Gardiner, 7 R. I. 22; Nightingale v. Harris, 6 R. I. 321; Dockray v. Dockray, 2 R. I. 547; Haydock v. Stanhope, 1 Curtis 471.
- ¹⁰ Stewart v. Spenser, 1 Curtis 157. See Smith v. Millett, 12 R. I. 59 and 11 R. I. 528.
 - ¹¹ Hall v. Denison, 17 Vt. 310.
- Pfeifer v. Dargan, 14 So. Car. 44; Le Prince v. Guillemot, 1 Rich. Eq. 187;
 Aiken v. Price, Dudley 50.
 Le Prince v. Guillemot, ubi supra.
 - ¹⁴ Niolon v. Douglas, 2 Hill Eq. 443; Jacot v. Corbet, 1 Cheves Eq. 71.
- ¹⁵ Gordon v. Cannon, 18 Gratt. 387; Kevan v. Branch, 1 Id. 274; Skipwith v. Cunningham, 8 Leigh 271.

were at first prohibited,¹ but have since been made valid by statute.² The weight of authority is now against allowing the validity of such provisions; but the tendency of creditors to accede to them has in practice generally overpowered the contrary inclination of the courts.

In the absence of statutory prohibitions, the debtor may give honest preferences in an assignment;³ but this privilege has in almost all the States been either wholly abrogated or largely restricted by statute.

If the assignor is solvent, and simply interposes a legal title in the way of his creditors to gain time at their expense,⁴ or to coerce a favorable settlement,⁵ or to avoid the loss to himself that would be caused by the sacrifice of his property at a forced sale,⁶ or if he makes it the duty of his assignee to impede the recovery of judgments against him,⁷ this is fraudulent as to his creditors;⁸ but the mere fact that he was or believed himself to be solvent will not justify an inference of fraud.⁹

An assignment for the benefit of creditors should be unconditional, not involving any unnecessary delay or prejudice to the claims of the creditors, ¹⁰ producing no benefit to the debtor at the expense of his creditors, ¹¹ and not designed or arranged to prevent the recovery of any creditor. ¹² Any limitation of time fixed for the creditors to assent to the assignment, ¹³ or for

¹ Baldwin v. Peet, 22 Tex. 708; Carlton v. Baldwin, Id. 724.

² Rev. Stats., 1879, Appendix, p. 5.

³ Reed v. McIntyre, 98 U. S. 507; Mayer v. Hellman, 91 U. S. 496; Brashear v. West, 7 Peters 608; Hauselt v. Vilmar, 76 N. Y. 630; Wilson v. Berg, 88 Penn. St. 167; Gordon v. Cannon, 18 Gratt. 388; Lay v. Seago, 47 Ga. 82; Tomlinson v. Matthews, 98 Ill. 178; Hampton v. Morris, 2 Met. (Ky.) 336; Lord v. Devendorf, 54 Wisc. 491; Lawrence v. Neff, 41 Cal. 566.

Downing v. Kelly, 49 Barb. 547; Kellogg v. Slawson, 15 Barb. 56; Gere v.
 Murray, 6 Minn. 305.
 Park Bank v. Whitmore, 104 N. Y. 297.

⁶ Shackelford v. Planters' Bank, 22 Ala. 238; Winchester v. Reid, 8 Jones N. C. Law 377.

⁷ Planck v. Schermerhorn, 3 Barb. Ch. 644; Gimell v. Adams, 11 Humph. 283; Marsh v. Bennett, 5 McLean 117.

⁸ Lehmer v. Herr, 1 Duv. 360; Gardner v. Commercial Bank, 95 Ill. 298; Holmberg v. Dean, 21 Kans. 73.

 $^{^9}$ Ogden v. Peters, 21 N. Y. 23; Bates v. Ableman, 13 Wisc. 644; Angell v. Rosenbury, 12 Mich. 421.

¹⁰ Owen v. Arvis, 26 N. J. L. 23; Fairchild v. Hunt, 14 N. J. Eq. 367.

Wilhelm v. Byles, 60 Mich. 561; Nicholson v. Leavitt, 10 N. Y. 591; 6 Id.
 4 Sandf. 252.
 Wilson v. Eifler, 7 Coldw. 31.

¹³ Hardin v. Osborne, 60 Ill. 93; Farquharson v. McDonald, 2 Heisk. 404; Knight v. Packer, 12 N. J. Eq. 214; Vaughan v. Evens, 1 Hill Eq. 414.

the completion of the trust by the assignee,1 must be reasonable, neither manifestly short nor unwarrantably long. Any unusual or improper stipulations in the assignment,2 the selection of an incompetent or unfit person for assignee,3 the giving of unusual or forbidden powers to the assignee,4 or his exemption from proper liability,5 provisions for the payment of any fictitious debts,6 or of debts for which the assignor is not the party liable,7 are all badges of fraud. The general principle is that a debtor's assignment will be vitiated if it rests upon and carries out an intention to secure to himself an advantage by depriving his creditors of any of their legal rights.8 The burden is upon a creditor who assails an assignment to show that it is of a fraudulent character; 9 but if this fraudulent character is shown, the assignment may be avoided, even by creditors who have assented to it, if their assent was given without any knowledge of the acts constituting the fraud.10 Such an assignment will, until avoided, be binding upon the debtor and his representatives, though voidable by his creditors. 11 An assignment of merely part of a debtor's

¹ Shearer v. Loftin, 26 Ala. 703; Johnston v. Thweatt, 18 Ala. 745; Henderson v. Downing, 24 Miss. 115; Hempstead v. Johnston, 18 Ark. 123.

² De Wolf v. A. & W. Sprague Manufacturing Co., 49 Conn. 282; Banning v. Sibley, 3 Minn. 389; McFarland v. Birdsall, 14 Ind. 126.

³ Walker v. Adair, 1 Bond 158; Beers v. Lyon, 21 Conn. 604; Reed v. Emery, 8 Paige 417; Sewall v. Russell, 2 Paige 175; Jennings v. Prentice, 39 Mich. 421; Guerin v. Hunt, 8 Minn. 477 and 6 Id. 375; Burr v. Clement, 9 Col. 1.

⁴ Sumner v. Hicks, 2 Black 532; Work v. Ellis, 50 Barb. 512; Jones v. Syer, 52 Md. 211; Conkling v. Coonrod, 6 Ohio St. 611; Landeman v. Wilson, 29 W. Va. 702; White v. Monsarrat, 18 B. Mon. 809; Gardner v. Commercial Bank, 95 Ill. 298; Rindskoff v. Guggenheim, 3 Coldw. 284.

⁵ Eigenbrun v. Smith, 98 Nor. Car. 207; August v. Seeskind, 6 Coldw. 166; Finlay v. Dickerson, 29 Ill. 9; True v. Congdon, 44 N. H. 48; Spinney v. Portsmouth Co., 25 N. H. 9.

⁶ American Exchange Bank v. Webb, 15 How. Pr. 193; Nightingale v. Harris, 6 R. I. 321; Silver Creek Bank v. Talcot, 22 Barb. 550; Henderson v. Haddon, 12 Rich. Eq. 393; Overton v. Holinshade, 5 Heisk. 683.

Wilson v. Robertson, 21 N. Y. 587; Hurlbert v. Dean, 2 Abbott Ap. Dc.

428; Kitchen v. Reinsky, 42 Mo. 427.

⁸ Keevil v. Donaldson, 20 Kans. 165; Johnson v. Whitwell, 7 Pick. 71; Harris v. Sumner, 2 Pick. 129; Quincy v. Hall, 1 Pick. 357; Hook v. Walton, 28 Tex. 59; Bailey v. Mills, 27 Id. 434.

⁹ Townsend v. Stearns, 32 N. Y. 209; Booth v. McNair, 14 Mich. 19; Whipple v. Pope, 33 Ill. 334; Conway ex parte, 4 Ark. 302; Kruse v. Prindle, 8 Oregon 158.

¹⁰ Hairgrove v. Millington, 8 Kans. 480.

Williams v. Avent, 5 Ired. Eq. 47; Coltraine v. Causey, 3 Id. 246; Van Winkle v. McKee, 7 Mo. 435.

property to secure part of his debts, if in fact honestly made, will not be vitiated by restrictions and stipulations which would be fatal to a general assignment; but the right of the general creditors to avoid a previous fraudulent conveyance will not be taken away by an assignment, except as prescribed by statutes.

The fact that a conveyance is made for the purpose of preferring one or more of the creditors of the grantor does not make it fraudulent as to his other creditors; ⁴ and they cannot disturb such a conveyance, made in good faith, of property not out of proportion to the debt so preferred, ⁵ though the effect is to make them lose their debts. ⁶ Though the preference thus made may to the knowledge of both parties operate to delay and hinder other creditors, yet it is not for that reason unlawful, unless it was intended to produce that result. ⁷ A debtor acting in good faith and without intent to defraud may, except in cases covered by statutes regulating bankruptcy and insolvency, mortgage or transfer his property to secure a particular creditor, ⁸ though suit is pending

¹ Swepson v. Exchange Bank, 9 Lea 713; Green v. Banks, 24 Tex. 508.

² Browning v. Hart, 6 Barb. 91; Monitor Furnace Co. v. Peters, 40 Ohio St. 575.

³ See Seibert v. Milligan, 110 Ind. 106; Schaller v. Wright, 70 Iowa 667.

⁴ Ashuelot Savings Bank v. Frost, 19 Fed. Rep. 237; Gardiner Bank v. Hagar, 65 Me. 359; Osgood v. Thorne, 63 N. H. 375; McGregor v. Chase, 37 Vt. 225; Gregory v. Harrington, 33 Vt. 241; Boswell v. Green, 25 N. J. L. 390; Broach v. Barfield, 57 Ga. 601; Newdigate v. Lee, 9 Dana 17; Landauer v. Vietor, 69 Wisc. 434; Gleason v. Day, 9 Wisc. 498; Sands v. Peirson, 61 Iowa 702; Stanton v. Green, 34 Miss. 576; Robinson v. Fairbanks, 81 Ala. 132; Iglehart v. Willis, 58 Tex. 306; Nathan v. King, 51 Cal. 521.

⁵ Budlong v. Kent, 28 Fed, Rep. 13; Shelton v. Church, 38 Conn. 416; Robinson v. Stewart, 10 N. Y. 189; Rahn v. McElrath, 6 Watts 151; Olmstead v. Mattison, 45 Mich. 617; Young v. Stallings, 5 B. Mon. 307; Bennett v. Union Bank, 5 Hump. 612; Dixon v. Higgins, 82 Ala. 284; Hoisington v. Ostrom, 27 Kans. 110.

⁶ Angell v. Pickard, 61 Mich. 561; Root v. Potter, 59 Mich. 498; Uhler v. Maulfair, 23 Penn. St. 481; Covanhovan v. Hart, 21 Id. 495; State v. Excelsior Co., 20 Mo. Ap. 21; Gaff v. Stern, 12 Id. 115.

⁷ Giddings v. Sears, 115 Mass. 505; Banfield v. Whipple, 14 Allen 13; National Bank of Metropolis v. Sprague, 20 N. J. Eq. 13; Aulman v. Aulman, 71 Iowa 124; Guyer in re, 69 Id. 585; Gage v. Parry, Id. 605; Citizens' Bank v. Rhutasel, 68 Id. 597; United States Bank v. Huth, 4 B. Mon. 423; Hefner v. Metcalf, 1 Head 577; Young v. Dumas, 39 Ala. 60; Walden v. Murdock, 23 Cal. 540; Mamlock v. White, 20 Cal. 598; Wheaton v. Neville, 19 Cal. 41.

⁸ Gardner v. Lane, 9 Allen 492; Burt v. Perkins, 9 Gray 317; Penniman v. Cole, 8 Met. 496; Eastman v. Eveleth, 4 Met. 148, 149; N. E. Ins. Co. v. Chandler, 16 Mass. 275; Pettee v. Dustin, 58 N. H. 309; Elliott v. Benedict, 13 R. I.

against him,¹ though he is insolvent,² and the preferred creditor knows this fact,³ though the preferred debt has not yet matured,⁴ though the transfer is of all his attachable property,⁵ and though he expects some advantage to himself or his family from the spontaneous bounty of the preferred creditor, there being no agreement therefor,⁶ and though his wife is paid for giving up a valid interest of her own.⁷ Even a failing debtor may at the common law, in the exercise of his right of preference, if he acts honestly, use property bought of one creditor for the payment of another.⁸ But the law does not allow a debtor to secure to himself as the price of a preference an advantage at the expense of his other creditors,⁹ his preference must not be made secretly and fraudulently,¹⁰ but openly and

463; Hendricks v. Robinson, 17 Johns. 438 and 2 Johns. Ch. 283; Guggenheimer v. Brookfield, 90 N. C. 232; Harshaw v. Woodfin, 64 N. C. 568; Hobbs v. Davis, 50 Ga. 213; Whitehead v. Woodruff, 11 Bush 209; Brown v. Smith, 7 B. Mon. 364; Ayers v. Adams, 82 Ind. 109; Stix v. Sadler, 109 Ind. 254; Eldridge v. Phillipson, 58 Miss. 270; Davis v. Scott, 22 Neb. 154; Grimes v. Farrington, 19 Neb. 44.

 1 Moog v. Farley, 79 Ala. 246; Bannon v. Bowler, 34 Minn. 416; Randall v. Shaw, 28 Kans. 419; Allen v. Kennedy, 49 Wisc. 549; Kuykendall v. McDonald, 15 Mo. 416; Frank v. Welch, 89 Ill. 38; Pringle v. Sizer, 2 So. Car. 59; Water-

bury v. Sturtevant, 18 Wend. 353.

- ² Hanchett v. Kimbark, 118 Ill. 121; Burt v. Perkins, 9 Gray 317; Scheitlin v. Stone, 43 Barb. 634; Coley v. Coley, 14 N. J. Eq. 350; Jones v. Naughright, 10 Id. 298; Garr v. Hill, 9 Id. 210; Lloyd v. Williams, 21 Penn. St. 327; Totten v. Brady, 54 Md. 170; Janney v. Barnes, 11 Leigh 100; Calloway v. People's Bank, 54 Ga. 441; Hubbard v. Taylor, 5 Mich. 155; Ford v. Williams, 3 B. Mon. 550; Wachter v. Famachon, 62 Wisc. 117; Huff v. Roane, 22 Ark. 184; Bierbower v. Polk, 17 Neb. 268; Tootle v. Coldwell, 30 Kans. 125; Arn v. Hoerseman, 26 Kans. 413.
- 3 Olmstead v. Mattison, 45 Mich. 617; Hessing v. McCloskey, 37 Ill. 341; Fromme v. Jones, 13 Iowa 474; Johnson v. McGrew, 11 Iowa 151; Sibley v. Hood, 3 Mo. 290; Hindman v. Dill, 11 Ala. 689; Walsh v. Kelly, 42 Barb. 98.
- 4 Bedell v. Chase, 34 N. Y. 386; Hill v. Northrop, 9 How. Pr. 525; Carpenter v. Muren, 42 Barb. 300.
- ⁵ Stewart v. Dunham, 115 U. S. 61; Giddings v. Sears, 115 Mass. 505; Eastman v. Eveleth, 4 Met. 137; Young v. Dumas, 39 Ala. 60; Schoverling v. Kovar, 15 Neb. 306.
- 6 Winch v. James, 68 Penn. St. 297; Webb v. Roff, 9 Ohio St. 430; Cureton v. Doby, 10 Rich. Eq. 411; Young v. Stallings, 5 B. Mon. 298.
 - ⁷ Marshall v. Hutchison, 5 B. Mon. 298.
- S O'Donald v. Constant, 82 Ind. 212; McKeown v. Coogler, 18 Fla. 866; Olmstead v. Mattison, 45 Mich. 617; Ferguson v. Kumler, 11 Minn. 104.
- ⁹ Kellog v. Richardson, 19 Fed. Rep. 70; Morrison v. Morrison, 49 N. H. 69; Smith v. Henry, 1 Hill (So. Car.) 16; Galt v. Dibrell, 10 Yerger 146; Richmond v. Curdup, Meigs 581; Leinkauff v. Frenkle, 80 Ala. 136.
- 10 Miller v. Tolleson, 1 Harp. Eq. 145; Nichols v. Reynolds, 1 R. I. 30; Ryan v. Daly, 6 Cal. 238.

fairly, without any other object than the act on its face purports.1 If the debtor acted with any fraudulent purpose, the preferred creditor is yet protected, if his object was merely to procure the payment of his honest demand, and he neither knew of nor participated in the debtor's fraudulent intent;² and the weight of authority as well as of sound reason is that his knowledge of the debtor's intended fraud will not be enough to avoid the transaction as to him unless he himself actually participated therein,3 though some decisions are otherwise.4 And in some States the right of preference by an insolvent debtor is restricted or denied.⁵ If there is a fraudulent intent shared in by both the debtor and the preferred creditor, the transaction may be avoided; 6 and though the preference itself is no evidence of such fraudulent intent,7 all the attendant circumstances must be considered in determining the question.8 The creditor may bargain in advance for a preference,9 but cannot make his bargain the means of gaining a false credit for the debtor, or of persuading the other creditors

¹ Pritchett v. Pollock, 82 Ala. 169; Charlton v. Lay, 5 Humph. 496; Wade v. Green, 3 Id. 547; Mitchell v. Beal, 8 Yerg. 134; Johnson v. Sullivan, 23 Mo. 474; Hancock v. Horan, 15 Tex. 507.

² Moline Wagon Co. r. Rummell, 14 Fed. Rep. 155; McLaren r. Thompson, 40 Me. 284; Hamilton r. Staples, 34 Conn. 316; Kirtland r. Snow, 20 Conn. 23; Kohn r. Clement, 58 Iowa 589; Ford r. Williams, 3 B. Mon. 550; Rankin r. Vandiver, 78 Ala. 562; Hodges r. Coleman, 76 Ala. 103; Knox r. Hunt, 18 Mo. 174; Little r. Eddy, 14 Mo. 160; Chouteau r. Sherman, 11 Mo. 385.

³ Banfield v. Whipple, 14 Allen 13; Dudley v. Danforth, 61 N. Y. 626; Bear's Estate, 60 Penn. St. 430; Worland v. Kimberlin, 6 B. Mon. 608; Beurmann v. Van Buren, 44 Mich. 496; Gilbert v. McCorkle, 110 Ind. 215; Gage v. Chesebro, 49 Wisc. 486; Albert v. Besel, 88 Mo. 150; Holmes v. Braidwood, 82 Mo. 610; Shelley v. Boothe, 73 Mo. 74; Gist v. Barrow, 42 Ark. 521.

 4 Carter v. Coleman, 82 Ala. 177; Redhead v. Pratt, 72 Iowa 99; McVeagh v. Baxter, 82 Mo. 518; McDonald v. Gaunt, 30 Kans. 693; Greenleve v. Blum, 59 Tex. 124.

 5 Commercial Bank v. Brewer, 71 Ala. 574; Wells v. Rahway Co., 19 N. J. Eq. 402; Holcomb v. Managers, 9 Id. 457; Brown v. Guthrie, 39 Hun 29; City Bank v. Goodrich, 3 Col. 139; Haas v. Haas, 35 La. An. 885; Stone v. Kidder. 6 Id. 552; Gillespie v. Cammack, 3 Id. 248.

⁶ Devries r. Phillips, 63 Nor. Car. 53; Crawford r. Nolan, 70 Iowa 97; Thomas v. Pyne, 55 Iowa 348; Bixby v. Carskaddon, 55 Iowa 533.

⁷ McCreery v. Gordon, 38 Hun 467; Jackson v. Spivey, 63 Nor. Car. 261; Haben v. Harshaw, 49 Wisc. 379; Meeker v. Harris, 19 Cal. 278; Seixas v. Brugier, 37 La. An. 509.

⁸ Hickox r. Elliott, 27 Fed. Rep. 830; Levy r. Williams, 79 Ala. 171; Hopkins r. Scott, 20 Ala. 179; Klee r. Reitzenberger, 23 W. Va. 749; Fuller r. Brewster, 53 Md. 358.

⁹ Smith v. Craft, 17 Fed. Rep. 705; Rencher v. Wynne, 86 Nor. Car. 268.

to inaction. Any valuable set-off existing in behalf of the debtor against the preferred creditor should be recognized in the preference.²

When one places his property in the hands of another to defraud his creditors, no court of justice will aid him to recover it back; his fraudulent conveyance is valid in favor of his grantees against himself and his heirs, and can be attacked and set aside, in cases where the rights of subsequent purchasers for value are not in question, only by the creditors whom he has attempted to defraud; and they can avoid it only by regular process of law. Subject to this right of the creditors, the fraudulent grantee takes the title of his grantor; the transfer is valid and binding as between the parties to it; the fact that it was fraudulent against creditors can be availed of only by creditors; and none of the parties to a covinous

- ¹ Krippendorf v. Hyde, 28 Fed. Rep. 788; Rencher v. Wynne, 86 Nor. Car. 268; McKinnon v. Reliance Lumber Co., 63 Tex. 30.
 - ² McArthur v. Hoysradt, 11 Paige 495; Menzel v. Ackerman, 35 N. J. Eq. 34.
- ³ Shaw v. Millsaps, 50 Miss. 380; Battle v. Street, 85 Tenn. (1 Pickle) 282; Owen v. Dixon, 17 Conn. 492; Silverman v. Bullock, 98 Ill. 11; Britt v. Aylett, 11 Ark. 475; Stanton v. Green, 34 Miss. 576; Fargo v. Ladd, 6 Wisc. 106; Hood v. Frellsen, 31 La. An. 577.
- ⁴ Blake v. Williams, 36 N. H. 39; Jewell v. Porter, 31 N. H. 34; Evans v. Herring, 27 N. J. Law 243; Henry v. Stevens, 108 Ind. 281; York v. Merritt, 80 Nor. Car. 285; Wilson v. Cheshire, 1 McCord Ch. 233; Lassiter v. Cole, 8 Humph. 621; Newell v. Newell, 34 Miss. 385; Walton v. Bonham, 24 Ala. 513; George v. Williamson, 26 Mo. 190; Montgomery v. Hunt, 5 Cal. 366.
- ⁵ Caswell v. Caswell, 28 Me. 232; Mohawk v. Atwater, 2 Paige 54; Holdrege v. Gwynne, 18 N. J. Eq. 26; Carter v. Bennett, 4 Fla. 283; Robinson v. Rogers, 84 Ind. 539; Edwards v. Haverstick, 53 Ind. 348; Hopkins v. Webb, 9 Humph. 519; Pennington v. Woodall, 17 Ala. 685; Walton v. Tusten, 49 Miss. 569; King v. Clay, 34 Ark. 291; Scott v. Briscoe, 37 La. An. 178; Frink v. Roe, 70 Cal. 296; Bickerstaff v. Doub, 19 Cal. 109.
- ⁶ Andrews v. Marshall, 43 Me. 272; Maley v. Barrett, 2 Sneed 501; Keys v. Grannis, 3 Nev. 548; Moore v. Pope, 27 La. An. 254.
- ⁷ McLane v. Johnson, 43 Vt. 48; Springer v. Drosch, 32 Ind. 486; Clemens v. Clemens, 28 Wisc. 637; Jacobi v. Schloss, 7 Coldw. 385.
- ⁸ Ruckman v. Ruckman, 32 N. J. Eq. 259; Gibbs v. Logan, 22 W. Va. 208; Jackson v. Dutton, 3 Harr. (Del.) 98; Stewart v. Ackley, 52 Barb. 283; Anderson v. Rhodus, 12 Rich. Eq. 104; Harmon v. Harmon, 63 Ill. 512; Etter v. Anderson, 84 Ind. 333; Van Wy v. Clark, 50 Ind. 259; Stephens v. Harrow, 26 Iowa 458; Ellis v. McBride, 27 Miss. 155; Ober v. Howard, 11 Mo. 425; Anderson v. Dunn, 19 Ark. 650.
- ⁹ Thompson v. Moore, 36 Me. 47; Harding v. Colon, 123 Mass. 299; Graser v. Stellwagen, 25 N. Y. 315; Bryod's Appeal, 31 Penn. St. 241; Cushwa v. Cushwa, 5 Md. 44; O'Neil v. Chandler, 42 Ind. 471; Currier v. Ford, 26 Ill. 488; Remington v. Bailey, 13 Wisc. 332; Whitney v. Freeland, 26 Miss. 481; Lemay v. Bibeau, 2 Minn. 291; Jordan v. Fenno, 13 Ark. 593.

transaction intended to cover the property from the creditors of either party will be allowed to impeach its validity by proving his own fraud against his own act, whether it were an absolute deed or a mortgage, or in whatever way it might be mingled with the arrangements between the parties. In whatever way the question may arise, the fraudulent conveyance is binding upon the parties and their heirs, and void only as against subsequent bonâ fide purchasers for value and the creditors of the grantor; 2 others are not in legal contemplation prejudiced by it, and cannot avoid it; 3 but it is binding only according to its real legal intent between the parties, as if it had been honestly given.4 So the property may, as against the fraudulent grantor, be appropriated by the creditors of the grantee while it is in the apparent ownership of the latter; 5 the fraudulent grantee's assignee for the benefit of creditors can hold the property against the grantor,6 but not against the action of the latter's creditors; but the grantor's assignee under a voluntary assignment for the benefit of creditors cannot at common law reclaim the property from the fraudulent grantee.8 As between the creditors of the fraudulent grantor and those of the fraudulent grantee, those who first obtain a legal hold upon the property will be allowed to retain it.9 Even a creditor of the fraudulent grantor, if he has knowingly made himself a party to the fraudulent transfer, is bound by it, and cannot afterwards avoid it for the satisfaction of his claim.10 The fraudulent grantor's executor or administrator, if

¹ Beadle v. Beadle, 2 McCrary 586; Gill v. Henry, 95 Penn. St. 388; Hess v. Final, 32 Mich. 515; Dietrich v. Koch, 35 Wisc. 618; Larimore v. Tyler, 88 Mo. 661; Franklin v. Stagg, 22 Mo. 193; Allison v. Hagan, 12 Nev. 3.

² Harvey v. Varney, 98 Mass. 118; Hill v. Pine River Bank, 45 N. H. 300; Chapin v. Pease, 10 Conn. 69; Ellis v. Higgins, 32 Me. 34; Robinson v. Stewart, 10 N. Y. 189; Huey's Appeal, 29 Penn. St. 219; Brown v. Webb, 20 Ohio 389; Bull v. Harris, 18 B. Mon. 195; Ward v. Enders, 29 Ind. 519; Welby v. Armstrong, 21 Ind. 489; Moore v. Meek, 20 Ind. 484; Wilson v. Horr, 15 Iowa 489; Lawton v. Gordon, 34 Cal. 36.

³ Gridley v. Wynant, 23 Howard 500; The Lion, Sprague 40; Woodman v. Bodfish, 25 Me. 317; Clute v. Fitch, 25 Barb, 428; Harry v. Graham, 1 Dev. & Bat. Law 76; La Crosse R. R. Co. v. Seeger, 4 Wisc. 268.

⁴ Livingston v. Ives, 35 Minn. 55.

- 5 Douglas v. Dunlap, 10 Ohio 162; Davis v. Graves, 29 Barb. 480; Maher v. Swift, 14 Nev. 324.
 - ⁶ Terrell v. Imboden, 10 Leigh 321.
 - ⁷ Holland v. Cruft, 20 Pick. 321; Jewett v. Tucker, 139 Mass. 566.
 - ⁸ Flower v. Cornish, 25 Minn. 473.
 - ⁹ Booth v. Bunce, 24 N. Y. 592.
 - ¹⁰ Schenck v. Hart, 32 N. J. Eq. 774; French v. Mehan, 56 Penn. St. 286.

the property is needed to pay the debts of the deceased, and if he can act as the representative of the creditors, may, so far as is necessary to pay such debts, recover back the property from the fraudulent grantee; 1 not otherwise; 2 but if the conveyance was induced by the fraud and falsehood of the grantee, and the grantor was not in pari delicto, then either the grantor in his lifetime, or his administrator, may avoid the conveyance and recover back the property.3 The rule is the same if the gift was never completed by delivery, or if the sale was merely colorable, no title passing.4 The creditors, or a receiver appointed at their instance, may avoid the fraudulent transfer so far as necessary to satisfy their debts and costs, any surplus realized over this amount from a sale of the property on their process belonging to the grantee from whom they have taken the property.⁶ It has been held in North Carolina that fraudulent conveyances are valid between the parties only if executed, being wholly void and not merely voidable so long as they are executory; 7 but the general rule is that all contracts, whether executed or executory, for the conveyance of property, either real or personal, to cover it up from the vendor's creditors, though voidable by the latter, are binding between the parties, even if the grantee shares in the fraudulent intent.8

- ¹ Frost v. Libby, 79 Me. 56; Parker v. Flagg, 127 Mass. 28; Wall v. Provident Institution for Savings, 6 Allen 320; S. C., 3 Allen 96; Holland v. Cruft, 20 Pick. 321; Abbott v. Tenney, 18 N. H. 109; Marsh v. Fuller, Id. 360; Lichtenberg v. Herdtfelder, 103 N. Y. 302; Barton v. Hosner, 24 Hun 467; Spoors v. Coen, 44 Ohio St. 497.
- ² Cook v. Chambers, 107 Ind. 67; Gilleland v. Failing, 5 Denio 308; Dennison v. Ely, 1 Barb. 610; Burton v. Farinholt, 86 Nor. Car. 260; Williams v. Williams, 34 Penn. St. 312; Warren v. Tobey, 32 Mich. 45; Hall v. Callahan, 66 Mo. 316; Merry v. Fremon, 44 Mo. 518; Crawford v. Lehr, 20 Kans. 509; Cobb v. Norwood, 11 Tex. 556; Sullice v. Gradenigo, 15 La. An. 582; Berens v. Dupre, 6 Id. 494.
- ³ Anderson v. Merideth, 82 Ky. 564; Kervick v. Mitchell, 68 Iowa 273; Davidson v. Carter, 55 Iowa 117; Prewett v. Coopwood, 30 Miss. 369; Ford v. Harrington, 16 N. Y. 285.
- 4 Hunt v. Butterworth, 21 Tex. 133; Cox v. Jackson, 6 Allen 108; Gilson v. Hutchinson, 120 Mass. 27.
 - ⁵ Bostwick v. Menck, 40 N. Y. 383.
- ⁶ Allen v. Ashley School, 102 Mass. 262; Orr v. Gilmore, 7 Lans. 345; Wood v. Hunt, 38 Barb. 302; Duncan v. Custard, 24 W. Va. 730; Murdock v. Welles, 9 Id. 552; Burtch v. Elliott, 3 Ind. 99.
- ⁷ Powell v. Inman, 8 Jones Law 436; Flynn v. Williams, 7 Ired. Law 32; West v. Dubberly, 2 Taylor 38. See also Nellis v. Clark, 20 Wend. 24, and the dissenting opinion of Nelson, C. J.
 - ⁸ Brooks v. Martin, 2 Wallace 72; Harvey v. Varney, 98 Mass. 118; Brown v.

A note given in payment for property conveyed in fraud of the vendor's creditors is valid and enforceable against the purchaser, so long and so far as the sale has not been avoided by such creditors. This rule is followed in Maine, Massachusetts, Vermont, Pennsylvania, and Missouri, on the principle that the sale is valid so far and so far only as it has not been avoided by creditors,2 but denied in Alabama, Kentucky, New Jersey, North Carolina, and South Carolina.3 If a voluntary conveyance is made in fraud of the grantor's creditors and under a secret trust for his benefit, he cannot in equity enforce this trust against his grantee,4 even though he is able to show an express promise by his grantee to reconvey to him, or to treat his absolute deed as a mortgage; 5 neither of the parties to the fraudulent conveyance, nor any volunteer claiming under them,6 will as against the other be relieved from its operation.7 But the fraud which will thus prevent a recovery must be proved by the person who alleges its existence.8 Nor can the debtor be heard to question the fairness or adequacy of the price realized by his creditor from the public sale of the fraudulently conveyed property.9 But the fact that a mortgage was given to a particular creditor to secure him and prevent other creditors of the mortgagor from seizing the property will not bar the mortgagor from redeeming the property by process of law; it simply shows a preference given to the mortgagee, not an intent to defraud the other creditors. 10 But if the debtor

Thayer, 12 Gray 1; Fairbanks v. Blackington, 9 Pick. 93; Knapp v. Lee, 3 Pick. 452; Smith v. Putney, 18 Me. 229, 238, practically overruling Smith v. Hubbs, 10 Me. 71; Hoeser v. Kraeka, 29 Tex. 450.

- ¹ Smith v. Quartz Co., 14 Cal. 242; Dyer v. Homer, 22 Pick. 253.
- ² Tuesley v. Robinson, 103 Mass. 558; Potter v. Belden, 105 Mass. 11.
- ³ Gary v. Jacobson, 55 Miss. 204, and cases there cited.
- ⁴ Kinney v. Virginia Mining Co., 4 Sawyer 382; Burleigh v. White, 64 Me. 23; Snyder v. Snyder, 51 Md. 77; Galt v. Jackson, 9 Ga. 151; Dunaway v. Robertson, 95 Ill. 419.
- ⁵ Eyre v. Eyre, 19 N. J. Eq. 42; Jones v. Farris, 70 Iowa 739; Ybarra v. Lorenzana, 53 Cal. 197; Weir v. Day, 57 Iowa 84; Jones v. Rahilly, 16 Minn. 320. But see Hartman v. Weiland, 36 Minn. 223.
 - 6 Owen v. Sharp, 12 Leigh 427.
- ⁷ Sweet v. Tinslar, 52 Barb. 271; Nellis v. Clarke, 20 Wend. 24; Hershey v. Weiting, 50 Penn. St. 240; Blount v. Costen, 47 Ga. 534; Barton v. Morris, 15 Ohio 408; Norris v. Norris, 9 Dana 317; Holliday v. Holliday, 10 Iowa 200; Noble v. Noble, 26 Ark. 317.
 - 8 Lathrop v. Pollard, 6 Col. 424; Chaffe v. Lisso, 34 La. An. 310.
 - ⁹ Guest v. Barton, 32 N. J. Eq. 120.
 - ¹⁰ Carpenter v. Cushman, 121 Mass. 265.

has obtained a reconveyance of the property from the fraudulent grantee, this is valid; and he and those claiming under him may enforce his rights under it,¹ even against the creditors of the fraudulent grantee who had obtained no hold upon the property before the reconveyance.² The innocent beneficiaries of a trust fraudulent as to creditors may enforce it against the fraudulent donor.³ Even the creditors' right to avoid a fraudulent conveyance will not be allowed if it is sought to be exercised collusively for the benefit of the debtor.⁴

The grantee in a conveyance tainted by actual fraud has not the right upon its avoidance to retain the amount of the consideration paid by him to the debtor for the transfer,5 the rule being that a conveyance which is fraudulent in fact cannot be sustained even for the reimbursement or indemnity of one who participated in the fraud; 6 but if it is only legally or constructively fraudulent it will be upheld in favor of the grantee so far as to secure to him the repayment of the consideration actually paid by him.7 The creditors are protected by the rule that a purchaser who has cooperated with his vendor, though merely by allowing the use of his name,8 in the misappropriation of the purchase-money, is himself liable to the person defrauded to the full extent of the fund so misapplied.9 A similar rule will be enforced where the grantee has paid off a mortgage or lien upon the property: if the lien has been kept alive, it will remain a charge upon the property; 10 if it has not, his

¹ Moore v. Livingston, 14 How. Pr. 1; Turner v. Campbell, 3 Gratt. 77.

² Clark v. Rucker, 7 B. Mon. 583.

³ Greenwood v. Coleman, 34 Ala. 150.

⁴ Feagan v. Cureton, 19 Ga. 404; Claffin v. Lisso, 27 Fed. Rep. 420.

⁵ Seivers v. Dickover, 101 Ind. 495; Holland v. Cruft, 20 Pick. 321; Bleakley's Appeal, 66 Penn. St. 187; Chapman v. Ransom, 44 Iowa 377; Allen v. Berry, 50 Mo. 90; Beckett v. Tyler, 3 McArthur 319.

⁶ Potter v. Stevens, 40 Mo. 229; Shepherd v. Woodfolk, 10 Lea 593; Brooks v. Caughran, 3 Head 464; Ferguson v. Hillman, 55 Wisc. 181; Thompson v. Bickford, 19 Minn. 17; Goodwin v. Hammond, 13 Cal. 168; Sale v. McLean, 29 Ark. 612.

⁷ Lobstein v. Lehm, 120 Ill. 549; Phelps v. Curts, 80 Ill. 109; Wood v. Goff, 7 Bush 59; Alley v. Connell, 3 Head 578; Parker v. Holmes, 2 Hill Eq. 95; Mc-Meekin v. Edwards, 1 Id. 288; Anderson v. Fuller, 1 McMull. Eq. 27; Boyd v. Dunlap, 1 Johns. Ch. 478; Van Schoyck v. Backus, 16 Hun 68.

⁸ Hughes v. Bloomer, 9 Paige 269.

⁹ Reeg v. Burnham, 55 Mich. 39; Bower v. Hadden Blue Stone Co., 30 N. J. Eq. 171.

¹⁰ Phillips v. Chamberlain, 61 Miss. 740; Smith v. Grimes, 43 Iowa 356; Mead v. Combs, 19 N. J. Eq. 112; Mobile Bank v. Harris, 6 La. An. 811.

reimbursement will depend upon his innocence of actual fraud.1 It is upon the same principle, perhaps sometimes a little stretched, that absolute deeds given to a creditor of the grantor, or upon an inadequate advance and under suspicious circumstances, or where their effect would operate a hardship upon other creditors, but the grantee is not shown to have participated in any fraud, have been sustained as equitable mortgages for the actual indebtedness or consideration, but no further; 2 if the grantee has been guilty of actual fraud, such a conveyance cannot be supported even to this extent.3 So if a grantee has in good faith made improvements upon the property, he should be reimbursed therefor if his grantor's creditors succeed in avoiding the conveyance for a fraud in which he did not himself participate.4 After preferential mortgages have been set aside at the instance of other creditors, the mortgagees have been allowed to share with the other creditors in the fund thus produced, if they were themselves free from fraud; not otherwise.5 A fraudulent grantee is under no liability to the grantor's creditors, if before they have begun proceedings to hold the property he has reconveyed it to the real owner, as in honesty he well may do.6 Nor can the creditors of the fraudulent grantee, if they have during his apparent ownership acquired no lien upon the property, complain of his reconveyance,7 unless perhaps he has gained credit from them upon his apparent ownership; 8 nor will fraudulent grantees incur any responsibility among themselves by permitting the grantor to

¹ Railroad Co. v. Soutter, 13 Wallace 517; Milholland v. Tiffany, 64 Md. 455; Pettus v. Smith, 4 Rich. Eq. 197; McLean v. Letchford, 60 Miss. 169; Wiley v. Knight, 27 Ala. 336; Lore v. Dierkes, 51 N. Y. Super. Ct. 144.

 $^{^2}$ Chickering v. Hatch, 3 Sumner 474; Hartfield v. Simmons, 12 Heisk. 253: Pope v. Wilson, 7 Ala. 690; Farlin v. Sook, 30 Kans. 401; Redhead v. Pratt, 72 Iowa 99; Keeder Co. v. Murphy, 43 Iowa 413.

³ Smith v. Craft, 12 Fed. Rep. 856; Foster v. Grigsby, 1 Bush 86; Salomon v. Moral, 53 How. Pr. 342; Sands v. Codwise, 4 Johns. 536; Thompson v. Pennell. 67 Me. 159; Hubbard v. Allen, 59 Ala. 283.

⁴ Borden v. Doughty, 42 N. J. Eq. 314; Kennedy v. Kennedy, 2 Ala. 571.

⁵ Lippincott v. Shaw Carriage Co., 25 Fed. Rep. 577; Wilson v. Horr, 15 Iowa 489; Johnston v. S. W. R. R. Co., 3 Strobh. Eq. 263.

⁶ Wheeler v. Kirtland, 23 N. J. Eq. 13; Lafayette Bank v. Brady, 96 Ind. 498; Swift v. Holdridge, 10 Ohio 230; Rayner v. Whicher, 6 Allen 292; Stanton v. Shaw, 59 Tenn. 12.

⁷ Powell v. Ivey, 88 Nor. Car. 256.

⁸ Budd v. Atkinson, 30 N. J. Eq. 530; Susong v. Williams, 1 Heisk. 625.

retain or dispose of any part of the property.1 Nor can a fraudulent grantee be held responsible by his grantor's creditors for portions or proceeds of the property which he has honestly applied towards paying the debts of the grantor; 2 the property has been applied as it should be; 3 and when the creditors have attained their rights, the law is satisfied.4 But if he has left the debtor to make the payments, he may be held for the latter's misappropriations,5 and also for what he has himself paid otherwise than in good faith.6 If a fraudulent grantee has disposed of the property put into his hands, the grantor's creditors may hold him for its proceeds,7 without deduction for his failure to collect them in full,8 but not for property which, though included in the fraudulent conveyance, rightfully belonged to others, and did not become available to himself.9 The court may follow these proceeds into any property in which the fraudulent grantee has invested them, 10 with any incidental profits which he has realized therefrom, 11 though this power has been denied; 12 but he is not responsible for the amount of insurance that he receives upon a destruction of the property by fire, the policy having been taken and paid for by himself.¹³ If he mingles goods fraudulently conveyed to him

¹ Riddle v. Lewis, 7 Bush 193.

² Crowninshield v. Kittridge, 7 Met. 520; Dolan v. Van Demark, 35 Kans. 304; Butler v. White, 25 Minn. 432.

- ³ Robinson v. Stewart, 10 N. Y. 189; Pond v. Comstock, 20 Hun 492; Frost v. Goddard, 25 Me. 414; Thomas v. Goodwin, 12 Mass. 140; Keith v. Proctor, 8 Baxter 189; Steere v. Hoagland, 50 Ill. 377.
 - ⁴ Langsdale v. Woollen, 99 Ind. 575.
 - ⁵ Clements v. Moore, 6 Wallace 299.
- ⁶ Williamson v. Goodwyn, 9 Gratt. 503; Borland v. Walker, 7 Ala. 269; Wood v. Hunt, 38 Barb. 302; Bean v. Smith, 2 Mason 252.
- ⁷ Heath v. Page, 63 Penn. St. 108; Hinton v. Ellis, 27 W. Va. 422; Solinsky v. Lincoln Savings Bank, 85 Tenn. (1 Pickle) 368; Williamson v. Williams, 11 Lea 355; O'Connor v. Boylan, 49 Mich. 209; Risser v. Rathburn, 71 Iowa 113; Davis v. Gibbon, 24 Id. 257; Smith v. Sands, 17 Neb. 498; Steere v. Hoagland, 50 Ill. 377; Mason v. Pierron, 69 Wisc. 585; Bremer v. Fleckenstein, 9 Oregon 266.
 - ⁸ Robinson v. Boyd, 17 Mich. 128; Watson v. Kennedy, 3 Strobh. Eq. 1.
 - ⁹ Hurd v. Ascherman, 117 Ill. 501.
- ¹⁰ De Witt v. Van Sickle, 29 N. J. Eq. 209; Sloan v. Torry, 78 Mo. 623; Mc-Gill v. Harman, 2 Jones Eq. 179; Brown v. Godsey, 2 Jones Law 417; Abney v. Kingsland, 10 Ala. 355.
 - ¹¹ Gillett v. Bate, 86 N. Y. 87.
 - ¹² Tubb v. Williams, 7 Humph. 367.
- ¹³ Lerow v. Wilmarth, 9 Allen 382; Nippes's Appeal, 75 Penn. St. 472; Bernheim v. Beer, 56 Miss. 149.

with his own property, the burden of distinguishing them is properly thrown upon him.¹ He may be held answerable for the rents and profits of the property in which the debtor has retained any real interest,² at any rate from the time of the creditors' avoidance of his conveyance,³ except so far as they are due to his own improvements.⁴

Though a sale be made with the design on the part of the vendor to defraud his creditors, it will yet be valid in favor of a bonâ fide purchaser for value without notice of the fraud; he will not be affected by the fraud of his vendor unshared in and unknown by himself,⁵ though his protection is sometimes limited to payments which he has made before receiving notice of his vendor's fraud,⁶ or which he has become bound to pay to innocent third persons.⁷ It is often held that it is not necessary that the purchaser should have actually participated in his vendor's fraudulent intent, that it is sufficient to render his purchase voidable if he had knowledge of it,⁸ or if he had notice of sufficient facts to put him on an inquiry from which he would have been led to infer the existence of such an intent in

¹ French v. Reel, 61 Iowa 143.

² Alexander v. Todd, 1 Bond 175; Popfinger v. Yutte, 49 N. Y. Super. Ct. 312; Mead v. Combs, 19 N. J. Eq. 112; Jones v. McCleod, 61 Ga. 602; Kitchell v. Jackson, 71 Ala. 556; Thompson v. Bickford, 19 Minn. 17.

³ Robinson v. Stewart, 10 N. Y. 189; Blow v. Maynard, 2 Leigh 29.

⁴ King v. Wilcox, 11 Paige 589.

Jones v. Simpson, 116 U. S. 609; Blodgett v. Chaplin, 48 Me. 322; Farley v. Carpenter, 27 Hun 359; Sands v. Hildreth, 14 Johns. 493; Ellinger v. Crowl, 17 Md. 361; Means v. Feaster, 4 So. Car. 249; Richardson v. Rhodus, 14 Rich. Law 95; Spring Lake Iron Co. v. Waters, 50 Mich. 13; Schroeder v. Walsh, 120 Ill. 403; Hanchett v. Kimbark, 118 Ill. 121; Miller v. Kirby, 74 Ill. 242; Hatch v. Jordan, Id. 414; Brown v. Riley, 22 Ill. 45; Trentman v. Swartzell, 85 Ind. 443; Palmer v. Henderson, 20 Ind. 297; Stewart v. English, 6 Ind. 176; Lehman v. Kelly, 68 Ala. 192; Stover v. Herrington, 7 Ala. 142; Wise v. Wimer, 23 Mo. 237; Smith v. Schmitz, 10 Neb. 600; Hedman v. Anderson, 6 Neb. 392; Curtis v. Valiton, 3 Mont. 153; Collins v. Cook, 40 Tex. 238; Kee v. Smith, 35 La. An. 518; Bastian v. Christesen, 34 Id. 883.

⁶ Florence Sewing Machine Co. v. Zeigler, 58 Ala. 221; Hamlin v. Wright, 26 Wisc. 50; Hunsinger v. Hofer, 110 Ind. 390; Rhodes v. Green, 36 Ind. 7; Dodson v. Cooper, 37 Kans. 346; Bush v. Collins, 35 Kans. 535; Massie v. Enyart, 32 Ark. 251.

⁷ Seager v. Aughe, 97 Ind. 285.

⁸ Parker v. Conner, 93 N. Y. 118; Roeber v. Bowe, 26 Hun 554; Roe v. Moore, 35 N. J. Eq. 526; Hough v. Dickinson, 58 Mich. 89; Bedford v. Penny, 58 Mich. 424; Tredwell v. Graham, 88 Nor. Car. 208; Watts v. Kiburn, 7 Ga. 356; McCormick v. Hyatt, 33 Ind. 546; Humphries v. Freeman, 22 Tex. 45; Weisiger v. Chisholm, Id. 670; Linn v. Wright, 18 Tex. 317.

his vendor; 1 but it is believed to be the sounder doctrine to hold, not only that reasonable cause to suspect a fraudulent intent, though evidence from which knowledge may often be inferred,2 falls short of being actual knowledge;3 but also that an honest purchaser for full value may maintain his purchase against the creditors of his vendor, if he acted fairly and without himself participating in any fraud, though he knows that his vendor made the sale with intent to hinder and defeat creditors.4 Mere knowledge on the part of the purchaser that the vendor was heavily indebted, or even insolvent, will not warrant regarding the purchase as fraudulent.⁵ An honest mortgagee is protected, to the extent of his interest, in the same manner as a purchaser would be.6 But a purchaser who does not show himself to have paid a valuable consideration is, though ignorant of any fraud, not protected in his purchase against the creditors of his vendor.7 The assumption of an existing indebtedness, the advancing of money for the benefit of a mortgagor, the relinquishment of a security, the extension of the time of payment of an existing debt, are all valuable considerations to sustain a sale or mortgage;8 and a transfer

² New York Ins. Co. v. Tooker, 35 N. J. Eq. 408; Greenwell v. Nash, 13 Nev. 286.

³ Carroll v. Hayward, 124 Mass. 120; Den v. Jaques, 5 Halst. 259; State v. Merritt, 70 Mo. 275; Coolidge v. Heneky, 11 Oregon 327.

⁴ Horbach v. Hill, 112 U. S. 144; Root v. Reynolds, 32 Vt. 139; Carroll v. Hayward, 124 Mass. 120; Currier v. Taylor, 19 N. H. 189; Doe d. Lassiter v. Davis, 64 Nor. Car. 498; Woody v. Dean, 24 So. Car. 499; Gridley v. Bingham, 51 Ill. 153; Drummond v. Couse, 39 Iowa 442; Mills v. Haines, 3 Head 332; Hurley v. Taylor, 78 Mo. 238; Montgomery v. Wilson, 31 La. An. 196.

⁵ Baughman v. Penn, 33 Kans. 504; Lewis v. Rice, 61 Mich. 98; Shealy v. Edwards, 78 Ala. 176; Cromelin v. McCauley, 67 Ala. 542; Dubose v. Young, 14 Ala. 139; Leasure v. Coburn, 57 Ind. 274; Sisson v. Roath, 30 Conn. 15; Cannon v. Young, 89 Nor. Car. 264; Bullock v. Gordon, 4 Munf. 450; Darland v. Rosencrans, 56 Iowa 122; Hughes v. Monty, 24 Iowa 499.

⁶ Sedgwick v. Place, 12 Blatchf. 163; Moore v. Sexton, 30 Gratt. 505; Spicer v. Robinson, 73 Ill. 519; Hedman v. Anderson, 6 Neb. 392.

⁷ Hitchcock v. Kiely, 41 Conn. 611; Hildreth v. Sands, 2 Johns. Ch. 35; Bolton v. Jacks, 6 Robt. 166; Martin v. Rexroad, 15 W. Va. 512; Miller v. Tolleson, 1 Harp. Eq. 145; Gamble v. Johnson, 9 Mo. 605; Hamilton v. Blackwell, 60 Ala. 545; Belt v. Raguet, 27 Tex. 471.

8 Powell v. Stickney, 88 Ind. 310; Adams v. Ryan, 61 Iowa 733; Guild v.

¹ Bartles v. Gibson, 17 Fed. Rep. 293; Biddinger v. Wiland, 67 Md. 359; Smith v. Wellborn, 75 Ga. 799; Atwood v. Impson, 20 N. J. Eq. 150; Green v. Tantum, 19 Id. 105; Lyons v. Hamilton, 69 Iowa 47; Kellogg v. Aherin, 48 Iowa 299; Hopkins v. Langton, 30 Wisc. 379; Avery v. Johann, 27 Wisc. 246; Bollman v. Lucas, 22 Neb. 796; Traylor v. Townsend, 61 Tex. 144; Garahy v. Bayley, 25 Tex. 294.

honestly made to pay or secure a preëxisting debt is also protected.¹ A deed given in execution of a previous agreement may rest upon the consideration for the agreement.² The purchaser will be bound by the fraud of his agent in the purchase, and by his own prior acts.³

A bonâ fide purchaser of real or personal property for value is equally protected if his purchase was made from a fraudulent grantee who could not himself have retained the property against the creditors of the original grantor,4 if his purchase is made and paid for before the creditors of the fraudulent grantor have acquired any lien upon the property by the institution of suit or otherwise.5 One who purchases in good faith at the foreclosure of a mortgage made in fraud of creditors gets a good title; but the fraudulent mortgagee himself can acquire no rights against the mortgagor's creditors by taking possession of the property. Even a conveyance made expressly to hinder the creditors of the grantor, the grantee participating in the fraud, cannot be set aside by those creditors after the property has passed under it into the hands of a bona fide purchaser for value without notice of their rights; 8 nor can it be avoided against the voluntary grantee of such a purchaser.9 But it is

Leonard, 18 Pick. 511; Head v. Horn, 18 Cal. 211; Agricultural Bank v. Dorsey, 1 Freem. Ch. 338; Smith v. Spencer, 73 Ala. 299; Thames v. Rembert, 63 Ala. 561.

- ¹ Dudley v. Danforth, 61 N. Y. 626; Reehling v. Byers, 94 Penn. St. 316; Beurmann v. Van Buren, 44 Mich. 496; Coleman v. Smith, 55 Ala. 368; Thompson v. Furr, 57 Miss. 478; Surget v. Boyd, Id. 485.
 - ² Pulte v. Geller, 47 Mich. 560.
- 3 Lund v. Equitable Assurance Society, 31 N. J. Eq. 355; Burley v. Marsh, 11 Neb. 291.
- ⁴ Comey v. Pickering, 63 N. H. 126; Green v. Tanner, 8 Met. 411; Phelps v. Morrison, 25 N. J. Eq. 538; Neal v. Gregory, 19 Fla. 356; Wright v. Howell, 35 Iowa 288; Abney v. Kingsland, 10 Ala. 355; Fury v. Kempin, 79 Mo. 477; Scheble v. Jordan, 30 Kans. 353.
- ⁵ Thames v. Rembert, 63 Ala. 561; Young v. Lathrop, 67 N. C. 63; Davis v. Briscoe, 81 Mo. 27; Hamlin v. Wright, 26 Wisc. 50; Shand v. Hanley, 71 N. Y. 319; Jackson v. Andrews, 7 Wend. 152; Ledyard v. Butler, 9 Paige 132; Reed v. Smith, 14 Ala. 380.
 - ⁶ Zoeller v. Riley, 100 N. Y. 102.
 - ⁷ Wells v. Langbein, 20 Fed. Rep. 183.
- 8 Simms v. Morse, 4 Hughes, C. C., 579; Gordon v. Ritenour, 87 Mo. 54; Wineland v. Coonce, 5 Mo. 296; Sparrow v. Chesley, 19 Me. 79; Neal v. Williams, 18 Me. 391; Frazer v. Western, 1 Barb. Ch. 220; Jackson v. Henry, 10 Johns. 185; Dixon v. Hill, 5 Mich. 404; Paige v. O'Neal, 12 Cal. 483; Richards v. Ewing, 11 Humph. 327.
 - ⁹ Moore v. Trimble, 94 Ind. 153.

only the purchaser for a valuable consideration 1 and without notice of the rights of the creditors of the original vendor 2 that is thus protected against them; nor will he be protected for advances or payments made by him after notice of the fraud in the conveyance to his grantor has been brought home to him.3 If his purchase is made pending a suit to set aside the conveyance to his grantor as fraudulent, he is affected with notice of the lis pendens; 4 nor can the original grantor acquire any rights under a bonâ fide purchaser from his fraudulent grantee.⁵ It has been held that neither a preëxisting creditor nor an assignee for the benefit of creditors can be regarded as a bonâ fide purchaser for value of property conveyed to meet the debts; 6 but this has also been denied.7 The notice of the creditors' rights need not necessarily be actual; if the purchaser is put upon inquiry, he must be charged with notice of the facts which he would have learned on inquiry.8 neither the original owner's retention of possession, nor judgments or levies against him after the recording of his conveyance, are sufficient notice of his creditors' rights to a purchaser from his fraudulent grantee; 9 nor is the purchaser bound to make inquiry whether there is any fraud or trust when no

¹ Jacobs v. Smith, 89 Mo. 673; Lillard v. Shannon, 60 Mo. 522; Forrest v. Camp, 16 Ala. 642; Lane v. Starkey, 15 Neb. 285.

² Kelly v. Simmons, 73 Ga. 716; Eigenbrun v. Smith, 98 Nor. Car. 207; Wade v. Saunders, 70 Nor. Car. 270; Jewett v. Cook, 81 Ill. 260; Smith v. Conkwright, 28 Minn. 23; Harrell v. Beall, 9 N. B. R. 49.

³ Thames v. Rembert, 63 Ala. 561; Marsh v. Armstrong, 20 Minn. 81; Colquitt v. Thomas, 8 Ga. 258; Rhodes v. Green, 36 Ind. 7.

⁴ Coleman v. Roff, 45 N. J. L. 7; Smith v. Ford, 48 Wisc. 115; Schaferman v. O'Brien, 28 Md. 565; Holden v. McLaury, 60 Tex. 228; New Orleans v. Marchand, 35 La. An. 222.

 $^{^5}$ Smyrna Building Loan Association v. Worden, 5 Del. 508; Birge v. Nock, 34 Conn. 156.

⁶ Clark v. Flint, 22 Pick. 231; Swan v. Crafts, 124 Mass. 453; Prout v. Vaughn, 52 Vt. 451; Jessup v. Hulse, 21 N. Y. 168; S. C., 29 Barb. 539; Manhattan Co. v. Evertson, 6 Paige 457; De Witt v. Van Sickle, 29 N. J. Eq. 209; Fleming v. Grafton, 54 Miss. 79.

⁷ Block v. Peter, 63 Ga. 260; Exchange Bank v. Knox, 19 Gratt. 739; Okie v. Kelly, 12 Penn. St. 323; Knox v. Hunt, 18 Mo. 174; Thornton v. Hook, 36 Cal. 223.

⁸ Hooser v. Hunt, 65 Wisc. 71; Baker v. Bliss, 39 N. Y. 70; Stearns v. Gage, 79 N. Y. 102; Brown v. Houser, 61 Ga. 629; Bradlee v. Whitney, 108 Penn. St. 362; Martel v. Somers, 26 Tex. 551.

⁹ Wood v. Wright, 4 Fed. Rep. 511; Boyle v. Rankin, 22 Penn. St. 168; Shorten v. Drake, 38 Ohio St. 76; Crockett v. Maguire, 10 Mo. 34; Murray v. Jones, 50 Ga. 109.

indication of the existence of either has been brought home to him.¹ The honest mortgagee of a fraudulent grantee has, to the extent of his interest, the same right of protection as any other purchaser;² and either creditors of the original owner, or that owner himself in a fiduciary capacity, may take valid mortgages from the fraudulent grantee to secure their claims,³ if they act in good faith.⁴ The fact that one asserting himself to be a bonâ fide purchaser for value has taken his title by a quitclaim deed, or one containing merely covenants of special warranty, while it may be some evidence that he has knowledge of a defect in the title, is not conclusive against him.⁵ One conceded to be a bonâ fide purchaser for value is entitled to all the benefits of his bargain; ⁶ but it must appear that his purchase was made in good faith and for actual value.⁵

A voluntary conveyance may be avoided, not only by the creditors of the grantor, under the circumstances already considered, but also by subsequent bonâ fide purchasers of the same property for value from him, upon proof that the prior gift was made with the intention of deceiving and defrauding them.⁸ In England, voluntary conveyances, and conveyances by way of settlement in consideration merely of love and affection or of a sense of moral duty, are held to be ipso facto fraudulent and void against subsequent purchasers for value, with or without notice of the prior voluntary conveyance; ⁹ and the same rule has been supported by some cases,

¹ Leach v. Ansbacher, 55 Penn. St. 85; Harrington v. Erie Savings Bank, 101
N. Y. 257; Hansen v. Berthelsen, 19 Neb. 433; Jones v. Hudson, 23 So. Car. 494.

 $^{^2}$ Brooks v. D'Orville, 7 Benedict 485; Stone v. Bartlett, 46 Me. 438; Bryan's Appeal, 101 Penn. St. 389; Shorten v. Drake, 38 Ohio St. 76; Gjerness v. Mathews, 27 Minn. 320.

 $^{^3}$ Murphy v. Briggs, 89 N. Y. 446; Murphy v. Moore, 23 Hun 95; Clinton Bank v. Cummins, 39 N. J. Eq. 577; Beam v. Bennett, 51 Mich. 148; Butler v. White, 25 Minn. 432.

⁴ Baker v. Bliss, 39 N. Y. 70; Brown v. Webb, 20 Ohio 389; Copenheaver v. Huffaker, 6 B. Mon. 18; Bowman v. McKleroy, 14 La. An. 587.

 $^{^5}$ Mansfield v. Dyer, 131 Mass. 200; Williamson v. Williams, 11 Lea 355; Craig v. Zimmerman, 87 Mo. 475.

⁶ Tappan v. Harbison, 43 Ark. 84.

⁷ Throckmorton v. Rider, 42 Iowa 84; Falconbury v. McIlravy, 36 Iowa 488.

⁸ Kohner v. Athenauer, 17 Cal. 578; Wolf v. Van Metre, 23 Iowa 397; Marston v. Brackett, 9 N. H. 336; Edwards v. Ballard, 14 B. Mon. 289; Laird v. Scott, 5 Heisk. 314; Lee v. Brown, 7 Ga. 275.

⁹ Doe v. Rusham, 17 Q. B., N. S., 724; Doe v. James, 16 East 212.

mainly early decisions, in this country.1 But the prevailing and sounder American doctrine is that such conveyances may be avoided by subsequent purchasers, not because they are voluntary merely, but because they are fraudulent,2 and that they are valid against all persons unless they are fraudulent at the time of their execution; 3 that a subsequent conveyance for value is indeed evidence, but not conclusive evidence of fraud in the prior voluntary conveyance; 4 and that a gift made honestly and without intent to defraud either creditors or subsequent purchasers is good against a subsequent purchaser for value with notice,5 though he may avoid it if it be not recorded and if he have no actual notice of it at the time of his purchase 6 and payment of the price.7 If the prior transfer is incomplete for lack of delivery or registration, it will of course be of no avail against a completed purchase for value.8 A voluntary assignment of a chose in action, made in good faith and not affecting creditors, is good against a subsequent assignee for value.9 It is often held that neither a voluntary nor even a fraudulent conveyance can be avoided by a subsequent purchaser for value with notice, on the ground that he cannot be said to be defrauded by that of which he was aware; 10 but this is denied elsewhere, if the prior conveyance was made with an actual fraudulent intent. In some States, a subsequent purchaser is allowed to avoid a prior conveyance only upon

 $^{^1}$ Howe v. Waysman, 12 Mo. 169; Rutledge v. Smith, 1 McCord Eq. 119; Anderson v. Green, 7 J. J. Marsh. 448.

 $^{^2}$ Boyd v. Turpin, 94 Nor. Car. 137; Troy v. Smith, 33 Ala. 469; Clapp v. Leatherbee, 18 Pick. 131.

³ Frink v. Roe, 70 Cal. 296; Commercial Bank v. Cunningham, 24 Pick. 270.

 $^{^4}$ Howard v. Snelling, 32 Ga. 195; Brown v. Burke, 22 Ga. 574; Cooke v. Kell, 13 Md. 469; Enders v. Williams, 1 Met. (Ky.) 346.

⁶ Beal v. Warren, 2 Gray 447; Laird v. Scott, 5 Heisk. 314; Jackson v. Town, 4 Cow. 603; Chaffin v. Kimball, 23 Ill. 36; Aiken v. Bruen, 21 Ind. 137; Cathcart v. Robinson, 5 Peters 263.

 $^{^6}$ Sterry v. Arden, 1 Johns. Ch. 261; Fowler v. Waldrip, 10 Ga. 350; Fleming v. Townsend, 6 Ga. 103.

⁷ Moshier v. Knox College, 32 Ill. 155.

⁸ Marshall v. Fulgham, 4 How. (Miss.) 216; Delacroix v. Lacaze, 14 La. An. 519.

⁹ Putnam v. Story, 132 Mass. 205; Thayer v. Daniels, 113 Mass. 129.

New 10 Stevens v. Morse, 47 N. H. 532; Baltimore v. Williams, 6 Md. 235; Warren v. Richardson, Id. 272; Hiatt v. Wade, 8 Ired. Law 340; Coppage v. Barnett, 34 Miss. 621; Gregory v. Haworth, 25 Cal. 653; Mitchell v. Steelman, 8 Cal. 363.

¹¹ Shaw v. Tracy, 83 Mo. 224; Laird v. Scott, 5 Heisk. 314; Elliott v. Horn, 10 Ala. 348; Carter v. Castleberry, 5 Ala. 277; Hill v. Ahern, 135 Mass. 158; Clapp v. Tirrell, 20 Pick. 247; Ricker v. Ham, 14 Mass. 137.

proof that it was made to defraud purchasers, and cannot rely upon an intent to defraud creditors. He must have purchased bonâ fide, for value, not for a grossly and manifestly inadequate price; but a mortgage was in one case allowed to the extent of his own interest to avoid a previous mortgage, given fraudulently and without consideration, though he took his mortgage for the purpose of avoiding the prior incumbrance and of giving to the mortgagor such benefit as the latter might derive from the enforcement of the second mortgage against the first. And the preference of a bonâ fide purchase over a prior gift takes place only when both are from the same owner of the property.

It has been said that in cases of fraud much latitude is allowed in the admission of evidence; ⁶ but this means only that every circumstance which can throw light upon the character of the transaction may be proved and considered, since the solution of the question will often depend upon the proof of many facts and circumstances which separately might be deemed immaterial, but together may show convincingly the good or bad intent of the parties. Fraud cannot of course be established by the mere proof of facts which are equally consistent with honesty; ⁸ but its existence may and often must be shown wholly by circumstantial evidence. Both the plaintiff and the defendant may prove any facts which tend to show the real intention of the parties in the transfer which is claimed

¹ Prestidge v. Cooper, 54 Miss. 74; Anderson v. Etter, 102 Ind. 115; Doolittle v. Lyman, 44 N. H. 608; McClenny v. Floyd, 10 Tex. 159; Moseley v. Moseley, 15 N. Y. 334; Bonney v. Taylor, 90 Mo. 63.

 $^{^2}$ Campbell v. Whitson, 68 Ill. 240; Mellen v. Ames, 39 Iowa 283; Powers v. Patten, 71 Me. 583; Alden v. Trubee, 44 Conn. 455.

³ Fullenwider v. Roberts, 4 Dev. & Bat. Law 278.

⁴ Hill v. Ahern, 135 Mass. 158. But see the well reasoned dissenting opinion of Field, J.

⁵ Bell v. McCawley, 29 Ga. 355; Russell v. Kearney, 27 Ga. 96.

⁶ Carew r. Mathews, 49 Mich. 302; Ferris r. Irons, 83 Penn. St. 179; Covanhovan r. Hart, 21 Id. 495; Douglas r. Hill, 29 Kans. 527; Day r. Stone, 59 Tex. 612.

⁷ Rosenthal v. Walker, 111 U. S. 185; Plimpton v. Goodell, 143 Mass. 365; Peterson v. Farnum, 121 Mass. 476; Cook v. Mason, 5 Allen 212; Heath v. Page, 63 Penn. St. 108; Zerbe v. Miller, 16 Id. 488; Chapman v. O'Brien, 34 N. Y. Super. Ct. 524; King v. Poole, 61 Ga. 373.

⁸ North River Bank v. Schumann, 63 How. Pr. 476; Davenport v. Wright, 51 Penn. St. 292; Miller v. Lebanon Lodge, 88 Ind. 286; Emmons v. Westfield Bank, 97 Mass. 230.

⁹ Booth v. Bunce, 33 N. Y. 139; Gallatian v. Cunningham, 8 Cow. 361; Ward v. Lamberth, 31 Ga. 150; Burt v. Timmons, 29 W. Va. 441; White v. Perry, 14 Id. 66; Lockhard v. Beckley, 10 Id. 87; Hunter v. Hunter, Id. 321; Renney v.

to have been fraudulent. The debtor's circumstances and the grantee's connection with him and means of information about him may properly be considered in determining the existence of the alleged fraudulent intent.2 Stronger evidence has been required to establish fraud than would suffice to prove an innocent transaction, sufficient to overcome the presumption of innocence; 3 but it is not necessary that the existence of fraud be proved in a civil action beyond a reasonable doubt,4 and it is difficult to say more than that the proof must be satisfactory upon the question of fact.⁵ Evidence of other transactions connected with the matter complained of is admissible,6 especially if the other transactions are between the same parties,7 and all the transactions appear to have been parts of one scheme and designed for the same purpose.8 But since testimony showing the bad faith of the parties in a matter happening at a different time and in no way connected with the case on trial is inadmissible to show fraud in the latter,9 and the

Williams, 89 Mo. 139; King v. Moon, 42 Mo. 551; Blackman v. Wheaton, 13 Minn. 326; Hicks v. Stone, Id. 434; Weisiger v. Chisholm, 28 Tex. 780; Burch v. Smith, 15 Id. 219; Fass v. Rice, 30 La. An., Pt. II., 1278.

- ¹ McAvoy r. Wright, 137 Mass. 207; Knowlton v. Moseley, 105 Mass. 136; Douglas v. Hill, 29 Kans. 527; Filley v. Register, 4 Minn. 391.
- ² Robinson v. Bliss, 121 Mass. 428; Stewart v. Fenner, 81 Penn. St. 177; Cooke v. Cooke, 43 Md. 522; Stadtler v. Wood, 24 Tex. 622.
- ³ Hatch v. Bayley, 12 Cush. 27; White v. Bettis, 9 Heisk. 645; Summers v. Clarke, 32 La. An. 670.
- 4 Tripner v. Abrahams, 47 Penn. St. 220; McConihe v. Sawyer, 12 N. H. 396; Bixby v. Carskaddon, 55 Iowa 533; Rice v. Dignowitty, 4 S. & M. 57; Harrell v. Mitchell, 61 Ala. 270; Ford v. Chambers, 19 Cal. 143.
- ⁵ See Burleigh v. White, 64 Me. 23; Stebbins v. Miller, 12 Allen 591; Shultz v. Hoagland, 85 N. Y. 464; Jaeger v. Kelley, 52 N. Y. 274; Kaine v. Weigley, 22 Penn. St. 179; Alston v. Rowles, 13 Fla. 117; Pogodzinski v. Kruger, 44 Mich. 79; Bodine v. Simmons, 38 Mich. 682; Carter v. Gunnels, 67 Ill. 270; Kelly v. Lenihan, 56 Ind. 448; Lillie v. McMillan, 52 Iowa 463; Kendall v. Hughes, 7 B. Mon. 368; Parkhurst v. McGraw, 24 Miss. 134; Rumbolds v. Parr, 51 Mo. 592; Hempstead v. Johnston, 18 Ark. 123; Moog v. Farley, 79 Ala. 246.
- 6 Taylor v. Robinson, 2 Allen 562; Boyd v. Brown, 17 Pick. 453; Wallach v. Wylie, 28 Kans. 138.
- ⁷ Wolfe v. Frederick, 59 Mich. 246; Adams v. Kenney, 59 N. H. 133; Hills v. Hoitt, 18 N. H. 603; Blake v. White, 13 N. H. 267; Pierce v. Hoffman, 24 Vt. 525; Lynde v. McGregor, 13 Allen 172; Brink v. Black, 77 Nor. Car. 59; State v. Excelsior Distilling Co., 20 Mo. Ap. 21.
- 8 Almond v. Gairdner, 76 Ga. 699; Lynde v. McGregor, $ubi\ supra$; Lillie v. McMillan, 52 Iowa 463.
- ⁹ Getman v. Oswego Bank, 89 N. Y. 136; Moog v. Farley, 79 Ala. 246; Bixby v. Carskaddon, 70 Iowa 726; Williams v. Robbins, 15 Gray 590; Sutter v. Lackmann, 39 Mo. 91.

fraudulent character of one conveyance cannot be shown by evidence that other unconnected conveyances by the same grantor were fraudulent, the admissibility of evidence of other transactions must depend upon the closeness of their connection with the one directly in question.2 If the fraudulent intent is to be shown by the existence of a secret trust in favor of the vendor, a merely oral trust may be shown, though it should have been in writing to be capable of enforcement between the parties; 3 any application of the property made or allowed to be made by the pretended grantee for the benefit of the grantor may be considered.4 Evidence that the purchaser paid a fair price, though not conclusive against the existence of fraud, will tend strongly to indicate good faith.⁵ The creditors who seek to set aside a conveyance will not be bound by its recitals or provisions, whatever the form adopted.6 The parties themselves may testify each to his own knowledge or intent in the transactions inquired into; 7 and their testimony will be acted upon if there is nothing in the circumstances or other evidence to meet it,8 but otherwise is merely evidence to be considered; 9 but no one can testify to the intent of another, for that must be gathered from his acts and the attending circumstances. 10 Nor can

² See Tufts v. Bunker, 55 Me. 178; Hardy v. Moore, 62 Iowa 65; Grant v. Libby, 71 Me. 427; Cook v. Swan, 5 Conn. 140; Winborne v. Lassiter, 89 N. C. 1.

 $^{^1}$ Nugent v. Jacobs, 103 N. Y. 125; Ford v. Williams, 13 N. Y. 577; Brett v. Catlin, 47 Barb. 404; Staples v. Smith, 48 Me. 470; Clark v. Johnson, 5 Day 373; Huntzinger v. Harper, 44 Penn. St. 204.

⁸ Huse v. Preston, 51 Vt. 245; McLane v. Johnson, 43 Vt. 48; Robinson v. Bliss, 121 Mass. 428; Rice v. Cunningham, 116 Mass. 466; Blair v. Alston, 26 Ark, 41.

⁴ Adler r. Apt, 31 Minn. 348; Emmons r. Westfield Bank, 97 Mass. 230; Parker v. Barker, 2 Met. 423.

⁵ Nugent v. Jacobs, 103 N. Y. 125; Truesdell v. Sarles, 104 N. Y. 164.

 $^{^6}$ Curger v. Tucker, 69 Ga. 557; Clapp v. Tirrell, 20 Pick. 247; Hills v. Eliot, 12 Mass. 26; Bolling v. Jones, 67 Ala. 508.

⁹ Brown v. Osgood, 25 Me. 505; Griffin v. Marquardt, 21 N. Y. 121; 17 N. Y. 28; Work v. Ellis, 50 Barb. 512; Newman v. Cordell, 43 Barb. 448; Atwood v. Impson, 20 N. J. Eq. 150; Bates v. Ableman, 13 Wisc. 644.

Manufacturers' Bank v. Koch, 105 N. Y. 630; Blaut v. Gabler, 77 N. Y.
 461; Spaulding v. Strang, 37 N. Y. 135; 38 N. Y. 9; Hathaway v. Brown, 22
 Minn. 214.

witnesses testify to their opinion that the mortgaging of a stock of goods is not in the usual course of business.1 Evidence that the parties or either of them were insolvent or embarrassed, or otherwise, or reputed to be so, or that no property of theirs could be found, is competent as bearing both upon their intent and their knowledge of each other's intent.2 Contemporary acts and declarations of the parties to the transaction complained of are competent as a part of the res gestæ, to show their intent, both to sustain and to overthrow the transaction.³ So the acts and declarations of the grantor just prior to the conveyance may be proved to show his intent, though knowledge of them was not brought home to the grantee; 4 but the conveyance will not be avoided unless the grantee is affected with knowledge of his grantor's fraud.⁵ The declarations of each party, whenever made, are competent against himself; 6 if a conspiracy or combination between the parties to the transaction attacked is first established by other evidence,7 then the declarations of the grantor, though subsequent to the conveyance, are competent against the grantee.8 Except to this extent, the

¹ Buffum v. Jones, 144 Mass. 29; Otis v. Hadley, 112 Mass. 100.

² Rea v. Missouri, 17 Wallace 532; Gordon v. Ritenour, 87 Mo. 54; Stewart v. Fenner, 81 Penn. St. 177; Tumlin v. Crawford, 61 Ga. 128; King v. Poole, Id. 373; Welsch v. Werschem, 92 Ill. 115; Jones v. King, 86 Ill. 225; Sweetser v. Bates, 117 Mass. 466; Clark v. Chamberlain, 13 Allen 257; Stebbins v. Miller, 12 Id. 591; Bartlett v. Decreet, 4 Gray 111; Lee v. Kilburn, 3 Id. 594; Price v. Mazange, 31 Ala. 701; Winfield v. Adams, 34 Mich. 437.

³ Bergman v. Twilight, 10 Oregon 337; Sanborn v. Lane, 41 Md. 107; Mc-Dowell v. Goldsmith, 2 Md. Ch. 370; 24 Md. 214; Claytor v. Anthony, 6 Rand. 285; Hart v. Newton, 48 Mich. 401; Angell v. Pickard, 61 Mich. 561; Risser v.

Rathburn, 71 Iowa 113; Wilcoxen v. Morgan, 2 Col. 473.

⁴ Walcott v. Keith, 22 N. H. 196; Paris v. Du Pre, 17 So. Car. 282; Roe v. Harrison, 9 So. Car. 279; Bishoff v. Hartley, 9 W. Va. 100; Lindauer v. Hay, 61 Iowa 663; Holmes v. Braidwood, 82 Mo. 610; Campbell v. Holland, 22 Neb. 587; McKinnon v. Reliance Lumber Co., 63 Tex. 30. Contra, Partelo v. Harris, 26 Conn. 480; McElfatrick v. Hicks, 21 Penn. St. 402.

⁵ Lincoln v. Wilbur, 125 Mass. 249; Foster v. Hall, 12 Pick. 89; Eaton v. Cooper, 29 Vt. 444; Landecker v. Houghtaling, 7 Cal. 391; Visher v. Webster, 8 Cal. 109; Hoose v. Robbins, 18 La. An. 648; Davis v. Stern, 15 Id. 177.

⁶ Wadsworth v. Williams, 100 Mass. 126; Stowell v. Hazelett, 66 N. Y. 635; White v. Perry, 14 W. Va. 66; Hunsinger v. Hofer, 110 Ind. 390; Gillet v. Phelps, 12 Wisc. 392; Hairgrove v. Millington, 8 Kans. 480.

⁷ Cuyler v. McCartney, 40 N. Y. 221; Tripner v. Abrahams, 47 Penn. St. 220; Claytor v. Anthony, 6 Rand. 285; Thames v. Rembert, 63 Ala. 561; Abney v. Kingsland, 10 Ala. 355.

⁸ Jenne v. Joslyn, 41 Vt. 478; Lee v. Lamprey, 43 N. H. 13; O'Neil v. Glover, 5 Gray 144; Newlin v. Lyon, 49 N. Y. 661; Waterbury v. Sturtevant, 18 Wend. 353; Stewart v. Johnson, 18 N. J. L. 87; Confer v. McNeal, 74 Penn. St. 112;

debtor's acts and declarations made after the completion of the transfer are not competent to show even his own fraudulent intent as against his grantee; ¹ he cannot by his own acts or declarations overthrow the title which he has made.² The only exception to this rule (and even this has been denied to be an exception ³) is when the debtor remains in possession of the property conveyed, in which case his acts and declarations are competent in his creditors' action against his grantee, so far as they characterize and explain his possession.⁴

Hartman v. Diller, 62 Id. 37; McDowell v. Rissell, 37 Id. 164; March v. Hampton, 5 Jones Law 382; Neal v. Peden, 1 Head 546; Sherman v. Hoagland, 73 Ind. 472; Brown v. Herr, 21 Neb. 113; Mamlock v. White, 20 Cal. 598.

¹ New York & Havana Cigar Co. v. Bernheim, 81 Ala. 138; Hanchett v. Kimbark, 118 Ill. 121; Higgins v. White, 118 Ill. 619; Phillips v. South Park, 119 Ill.

626; Lewis v. Rice, 61 Mich. 96; Albert v. Besel, 88 Mo. 150.

- ² Clements v. Moore, 6 Wallace 299; Paine v. Griffin, 7 Blackf. (Ind.) 485; McAvoy v. Wright, 137 Mass. 207; Lincoln v. Wilbur, 125 Mass. 249; Perkins v. Barnes, 118 Mass. 484; Winchester v. Charter, 97 Mass. 140; Burnham v. Brennan, 74 N. Y. 597; Wells v. O'Connor, 27 Hun 426; City Bank v. Hamilton, 34 N. J. Eq. 158; Sackett v. Spencer, 65 Penn. St. 89; Ohio Coal Co. v. Davenport, 37 Ohio St. 194; Frankel v. Coots, 41 Mich. 75; Bennett v. Stout, 98 Ill. 47; Adler v. Apt, 30 Minn. 45; Vance v. Smith, 2 Heisk. 343; Moog v. Farley, 79 Ala. 246; Foote v. Cobb, 18 Ala. 585; Taylor v. Webb, 54 Miss. 36; De Garca v. Galvan, 55 Tex. 53. Contra, Hogan v. Robinson, 94 Ind. 138.
 - ³ Gates v. Mowry, 15 Gray 564.
- ⁴ United States v. Griswold, 8 Fed. Rep. 556; Caswell v. Hill, 47 N. H. 407; Pomeroy v. Bailey, 43 N. H. 118; Redfield v. Buck, 35 Conn. 328; Newlin v. Lyon, 49 N. Y. 661; Jacobs v. Remsen, 36 N. Y. 668; Deakers v. Temple, 41 Penn. St. 234; Hilliard v. Phillips, 81 Nor. Car. 99; Oatis v. Brown, 59 Ga. 711; Commonwealth v. Fletcher, 6 Bush 171; Glaze v. Blake, 56 Ala. 379; Cahoon v. Marshall, 25 Cal. 197.

DUMPOR'S CASE.

HIL. 45 ELIZ. - IN THE KING'S BENCH.

[REPORTED 4 COKE, 119.]

When a condition not to alien without license is determined by the first license granted. — Apportionment of conditions.

In (a) trespass between Dumpor and Symms, (b) upon the general issue, the jurors gave a special verdict to this effect: the President and Scholars of the College of Corpus Christi, in Oxford, made a lease for years in anno 10 Eliz. of the land now in question, to one Bolde, proviso that the lessee or his assigns should not alien the premises to any person or persons, without the special license of the lessors. And afterwards the lessors by their deed, anno 13 Eliz., licensed the lessee to alien, or demise the land, or any part of it, to any person or persons quibuscunque. And afterwards, anno 15 Eliz., the lessee assigned the term to one Tubbe, who by his last will devised it to his son, and by the same will made his son executor, and died. son entered generally, and the testator was not indebted to any person, and afterwards the son died intestate, and the ordinary committed administration to one who assigned the term to the defendant. The President and Scholars (c), by warrant of attorney, entered for the condition broken, and made a lease to the plaintiff for twenty-one years, who entered upon the defendant, who reëntered, upon which reëntry this action of trespass was brought; and that upon the lease made to Bolde, the yearly rent of 33s. 4d. was reserved, and upon the lease to the plaintiff, the yearly rent of 22s. was only reserved. And the

⁽a) The rule laid down in this case has been done away with by stat. 22 & 23 V. c. 35, so far as relates to conditions contained in leases. See post, p. 47, $in\ not \hat{a}$.

⁽b) Co. Ent. 684. pl. 22; Cr. El. 815, 816.

⁽c) See 3 Wilson, 234.

jurors prayed upon all this matter the advice and discretion of the Court, and upon this verdict judgment was given against the plaintiff. And in this case divers points were debated and resolved; 1st. That the alienation by license to Tubbe had (a) determined the condition, so that no alienation which he might afterwards make could break the proviso, or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time, and that the same estate should remain subject to the proviso after. And although the proviso be, that the lessee or his assigns shall not alien, yet when the lessors license the lessee to alien, they shall never defeat, by force of the said proviso, the term which is absolutely aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent: so if the lessors dispense with one alienation, they thereby dispense with all alienations after; for inasmuch as by force of the lessor's license, and of the lessee's assignment, the estate and interest of Tubbe was absolute, it is not possible that his assignee who has his estate and interest shall be subject to the first condition: and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for if the lessor dispense with one, all the others are at liberty. And therefore it was adjudged, Trin. 28 Eliz. Rot. 256, in Com' Banco inter Leeds (b) and Compton, that where the Lord Stafford made a lease to three, upon condition that they or any of them should not alien without the assent of the lessor, and afterwards one alienated by his assent, and afterwards the other two without license, and it was adjudged, that in this case the condition being determined as to one person (by the license of the lessor) was determined in all. And (c) Popham, Chief Justice, denied the case in 16 Eliz., Dver (d), 334; that if a man leases land upon condition that he shall not alien the land, or any part of it, without the assent of the lessor, and afterwards he aliens part with the assent of the lessor, that he cannot alien the residue without the assent of the lessor: and conceived, that is not law, for he said the condition could not be divided or (e) appointed by the act of the parties;

⁽a) 1 Roll. Rep. 70, 390; 1 Roll. 422, 471; 2 Bulst. 291; Cro. Jac. 398; 3 Co. Pennant's case; 3 Ed. 6, Dyer, 66. a.

⁽b) 1 Roll. 472; Cro. El. 816; Godb. 93; Noy, 32; 4 Leon. 58; 2 Bulstr. 291.

⁽c) Styles, 317.

⁽d) Dy. 334. pl. 32; Cro. El. 816; Styles, 334; Moor, 205.

⁽e) Co. Lit. 215. a.

and in the same case, as to parcel which was aliened by the assent of the lessor, the condition is determined; for although the lessee aliens any part of the residue, the lessor shall not enter into the part aliened by license, and, therefore, the condition being determined in part is determined in all. And therefore, the Chief Justice said, he thought the said case was falsely printed, for he held clearly that it was not law. Nota, reader, Paschæ 14 Eliz. Rot. 1015, in Com' Banco, that where the lease was made by deed indented for twenty-one years of three (a) manors, A., B., C., rendering rent, for A. 6l., for B. 5l., for C. 10%, to be paid in a place out of the land, with a condition of reëntry into all the three manors, for default of payment of the said rents, or any of them, and afterwards the lessor by deed indented and enrolled, bargained and sold the reversion of one house and forty acres of land, parcel of the manor of A., to one of his heirs, and afterwards by another deed indented and enrolled, bargained and sold all the residue to another and his heirs, and if the second bargainee should enter for the condition broken or not was the question: and it was adjudged, that he should not enter for the (b) condition broken, because the condition being entire could not be apportioned by the act of the parties, but by the severance of part of the reversion it is destroyed in all. But it was agreed, that a condition may be (c) apportioned in two cases, 1. By act in law. 2. By act and wrong of the lessee. By act in law, as if a man seized of two acres, the one in fee, and the other in (d) borough English, has issue two sons, and leases both acres for life or years, rendering rent with condition, the lessor dies, in this case by this descent, which is an act in law, the reversion, rent, and condition are divided. 2. By act and wrong of the lessee, as if the lessee makes a feoffment of part, or commits waste (e) in part, and the lessor enters for the forfeiture, or recovers the place wasted, there, the rent and condition shall be apportioned, for none

⁽a) Dyer, 308, 309, pl. 75; 5 Co. 55. b; Moor, 97, 98. [By 22 & 23 Vict. c. 35, s. 3, where the reversion on a lease is severed and the rent is legally apportioned, the assignee of each part of the reversion is entitled in respect of the apportioned rent to the benefit of the condition. And see further, as to apportionment, 44 & 45 Vict. c. 41, s.

^{12,} in the case of leases made after that Act.]

⁽b) Co. Lit. 215. a; Cro. Jac. 390; 5 Co. 55. b.

⁽c) 3 Bulstr. 154; Co. Lit. 215. a.

⁽d) 1 Rol. Rep. 331; Co. Lit. 215. a. See Baron and Baroness de Rutzen v. Lewis, 5 A. & E. 277.

⁽e) 1 Rol. Rep. 331; Moor, 203.

shall take advantage of his own wrong, and the lessor shall not be prejudiced by the wrong of the lessee: and the Lord Dyer, then Chief Justice of the Common Pleas, in the same case, said, that he who enters for a condition broken ought to be in of the same estate which he had at the time of the condition created, and that he cannot have, when he has departed with the reversion of part: and with that reason agrees Litt. 80, b. And vide 4 & 5 Ph. & Mar. Dyer (a), 152, where a proviso in an indenture of lease was that the lessee, his executors or assigns, should not alien to any person without license of the lessor, but only to one of the sons of the lessee; the lessee died, his executor assigned it over to one of his sons, it is held by Stamford and Catlyn, that the son might alien to whom he pleased, without license (b), for the condition, as to the son, was determined, which agrees with the resolution of the principal point in the case at bar. 2. It was resolved, that the statutes of 13 Eliz. cap. 10, and 18 Eliz. cap. 11, concerning leases made by Deans and Chapters, Colleges, and other ecclesiastical persons are (c) general laws whereof the court ought to take knowledge, although they are not found by the jurors, and so it was resolved between Claypole and Carter in a writ of error in the King's Bench.

[This decision was acted on for a long time, although more than once disapproved of.] In Doe v. Bliss, 4 Taunt. 735, Sir James Mansfield, C. J., said: "The profession have always wondered at Dumpor's Case, but it has been law so many centuries, that we cannot now reverse it." In Brummel v. Macpherson, 14 Ves. 173, Lord Eldon said: "Though Dumpor's Case always struck me as extraordinary, it is the law of the land." Accordingly it [was] affirmed by many subsequent decisions, nay, it [was] even carried further, for it was held that whether the license to assign [was] general, as in the principal case, or particular as "to one particular person subject to the performance of the covenants in the original lease;" still the condition [was] gone, and the assignee might assign without license. Brummel v. Macpherson, 14 Ves. 173. [At length, however, the legislature interfered, and this rule has, by the operation of the statutes 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, ceased to be law, so far as relates to conditions in leases, and to licenses and waivers of such conditions occurring after the passing of those acts. By the first section of the 22 & 23 Vict. c. 35, it is provided that where any license to do any act which, without such license, would create a forfeiture, or give a right to reënter, under a con-

⁽a) Dy. 152. pl. 7; Co. Lit. 215, a; Cro. Eliz. 757, 816.

⁽b) Quære, see Lloyd v. Crispe, 5 Taunt. 249, post in notâ.

⁽c) 2 Roll. 765; Yelv. 106; Doct. pl. 337, 338; Noy, 124; 2 Brownl. 208; Cro. El. 816; Moor, 593; 1 Leon. 306, 307.

dition or power reserved in any lease theretofore granted, or to be thereafter granted, shall at any time, after the passing of that act, be given to any lessee or his assigns, "every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made, or to be made, or to the actual assignment, under-lease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceedings for any subsequent breach (unless otherwise specified in such license); and all rights under covenants and powers of forfeiture, and reëntry in the lease contained, shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorized or made dispunishable by such license, in the same manner as if no such license had been given; and the condition or right of reëntry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done."

The second section of this act provides that where in any lease theretofore granted, or to be thereafter granted, there is or shall be a power or condition of reëntry on assigning, or under-letting, or doing any other specified act without license, and a license at any time after the passing of the act shall be given to one of several lessees or co-owners to assign or under-let his share or interest, or to do any other act prohibited to be done without license, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or under-let part only of the property, or to do any other such act as aforesaid in respect of part only of such property, "such license shall not operate to destroy or extinguish the right of reëntry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests, or remaining property; but such right of reëntry shall remain in full force over or in respect of the shares or interests or property not the subject of such license."

The above-mentioned act did not interfere with the effect of *Dumpor's Case* upon questions of waiver, but the later act — the 23 & 24 Vict. c. 38 — provides, by s. 6, that where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place, after the passing of that act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

[Though these important enactments have destroyed the authority of *Dumpor's Case* itself, the note which deals chiefly with the doctrine of waiver of forfeiture, a doctrine which is still of considerable practical importance, has been retained in the present edition.

Landlords' powers of enforcing forfeitures for breach of conditions other than those against assignment, under-letting, &c., have been considerably abridged by s. 14 of the Conveyancing Act, 1881, as to which Act see the end of this note.]

At common law the license, in order to put an end to the condition, must have been such a license as was therein contemplated, for where the condition was not to assign without license in writing, a parol license was no dispensation. Roe v. Harrison, 2 T. R. 425; Macher v. Foundling Hospital, 1 V. & B, 191; Richardson v. Evans, 3 Madd. 218; though it is said that if such parol

license were used as a snare, equity would relieve. Richardson v. Evans, 3 Madd. 218. It seems, too, that if the condition was not in general restraint of assignment, but permitted the lessee to assign in one particular way, ex. gr. by will, an assignee to whom the lease had been transferred in the permitted way could not assign in any other mode. Lloyd v. Crispe, 5 Taunt. 249. "The ground of Dumpor's Case" (says Gibbs, J.) "was this: the proviso was that the lessee or his assigns should not alien the premises to any person or persons without the special license of the lessors; the lease was therefore to be void if any assignment was made. And there the court was of opinion that if the condition was once dispensed with, it was wholly dispensed with, because the provision for making void must exist entire, or not exist at all. But here is an exception out of the original restriction to alienate, so that in the alienation by will made by the lessees there was nothing to license." Also by defeasance properly framed to revive the condition, a license to assign might virtually be limited to the particular assignment. See 3 Jarman's Conv. by Sweet, 685. But it was intimated by Gibbs, C. J., that there would have been great difficulty in giving that effect to any merely restrictive words in the license. Mason v. Corder, 7 Taunt. 9.

Although, when such a condition as that in Dumpor's Case exists, alienation without license operates as a forfeiture of the term; still, if the lessor, with knowledge of the forfeiture, receive rent due since the condition broken, such conduct upon his part operates as a waiver of his right to take advantage of it. But not so if the landlord was unaware of the fact of the forfeiture at the time of receiving the rent, Roe v. Harrison, 2 T. R. 425; Doe v. Birch, 1 M. & W. 402, unless, perhaps, where it appears from other circumstances, that the rent was accepted with an intention of continuing the tenancy notwithstanding any forfeiture that might have occurred. In Goodright v. Davies, Cowp. 803, the lease contained a covenant not to under-let without license, and a power of reentry to the lessor in case of non-observance of the covenants; the lessee underlet various parts of the premises, but the lessor knew of it, and received rent afterwards. "The case," said Lord Mansfield, "is extremely clear. To construe this acceptance of rent due since the condition broken, a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition the landlord had a right to enter. He had full notice of the breach, but does not take advantage of it, but accepts rent subsequently accrued. That shows he meant that the lease should continue. Forfeitures are not favored in law; and when a forfeiture is once waived, the court will not assist it." See Browning and Beston's Case, Plowd. 133; Roe v. Harrison, 2 T. R. 425; Doe d. Gatehouse v. Rees, 4 Bing. N. C. 384 [Walrond v. Hawkins, L. R. 10 C. P. 342, and 44 L. J. C. P. 116, and as to the effect of notice of one breach of covenant where several of the same kind have been committed. see Croft v. Lumley, 5 E. & B. 648, and the opinions of the judges in the same case in the House of Lords, 6 H. of L. C. 672]. And other acts of the lessor, besides acceptance of rent, have been held to waive a forfeiture, when they show an intention on his part that the lease should continue. Doe v. Meux, 4 B. & C. 606; see Doe v. Birch, 1 M. & W. 408; Doe d. Baron and Baroness de Rutzen v. Lewis, 5 A. & E. 277 [Dendy v. Nicholl, 4. C. B., N. S. 376; Ward v. Day, 4 B. & S. 337; affirmed, 5 B. & S. 359; 33 L. J. Q. B. 3; affirmed, ibid. 254; Pellatt v. Boosey, 31 L. J. C. P. 281; Griffin v. Tomkins, 42 L. T. 359; per Cockburn, C. J. A notice to repair generally "in accordance with the covenants" in a lease was held no waiver of forfeiture for non-repair. Few v. Perkins, L. R. 2 Ex. 92; 36 L. J. Ex. 54. In Ward v. Day, supra, the forfeiture of a grant was held to be waived by the grantor having, in negotiations for a

renewal of it, treated it as subsisting. As to waiver by the language used in pleadings, see Evans v. Davis, 10 Ch. D. 747; 48 L. J. Ch. 223.]

It is conceived, that the mere receipt of subsequent rent does not, of its own proper force, operate as a waiver of the forfeiture. It is only evidence of the election of the lessor to retain the reversion and its incidents, instead of the possession of the land; and, as an election once made and expressed cannot be retracted(quod semel placuit in electionibus amplius displicere non potest, Co. Litt. 146, a. [see Ward v. Day, 4 B. & S. 337; 5 B. & S. 359; 33 L. J. Q. B. 3; Grimwood v. Moss, L. R. 7 C. P. 360; 41 L. J. C. P. 239]); the receipt of subsequent rent as such, without more, binds the landlord by proving an election. But rent to the amount of that reserved in the lease may be received under circumstances showing it to be paid and accepted merely as compensation for use of the land, and not with the intention of setting up the lease; nay, a contrary intention may be expressed at the time of its receipt. A receipt of rent under such circumstances would not, it seems, amount to a waiver of the forfeiture. See Doe v. Batten, Cowp. 243. It is not supposed that the naked question of intention to waive would in such a case be left to the jury. The question should perhaps be, Did the lessor receive the rent eo nomine as rent due under the lease? See per Parke, J., Doe v. Pritchard, 5 B. &. Ad. 776.

A receipt of rent after the lessor has by some unequivocal act, such as bringing ejectment, expressed his election to treat the lease as void, cannot operate to revive it. Jones v. Carter, 15 M. & W. 718. See Co. Litt. 215, a. [Grimwood v. Moss, L. R. 7 C. P. 360; 41 L. J. C. P. 239, and e converso, if the lessor have by such an unequivocal act, as for instance by suing for rent due subsequently to the forfeiture, expressed his election to affirm the lease, he cannot afterwards treat the tenant as a trespasser. Dendy v. Nicholl, 4 C. B., N. S. 376. Mr. Justice Willes is misreported to have said in this case that the doctrine in the above paragraph has been exploded; and in the late case of Grimwood v. Moss, ubi sup., the same learned judge says that he is "not prepared to be the first to shake or fritter away the authority of the case of Jones v. Carter;" and in Doe d. Nash v. Birch, 1 M. & W. 408, Parke, B., says, "I think that an absolute unqualified demand of the rent by a person having sufficient authority would have amounted to a waiver of the forfeiture." But where ejectment was brought on a forfeiture for breaches of covenant, and the plaintiff assigned as particulars of breaches both a breach for non-payment of rent from the 25th March, 1867, to the 25th March, 1870, and also a breach in permitting a sale by auction on the premises on the 25th of May, 1867, it was held that the latter forfeiture was not waived by the mere assignment of the breach for non-payment of rent notwithstanding that such rent partly accrued due subsequently to the auction. Nor did it make any difference in that case that the defendant obtained a judge's order under s. 212 of the Common Law Procedure Act, 1852, and tendered the amount of the rent due, and ultimately paid it into court, the plaintiff having refused to accept the rent when tendered or to take it out of court. Toleman v. Portbury, L. R. 6 Q. B. 245; L. R. 7 Q. B. 344; 41 L. J. Q. B. 98.

In *Evans* v. *Davis*, 10 Ch. D. 747; 48 L. J. Ch. 223, the lessor was held precluded from insisting on a forfeiture, when in his statement of claim he alleged his own continued willingness to grant a lease in pursuance of the agreement alleged by him to have been put an end to by way of forfeiture.

In Davenport v. The Queen, 3 App. Cas. 115; 47 L. J. P. C. 8, the Lords of the Privy Council held that "where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such

a receipt." They further held to be useless a direction of a judge to a jury "that the intention of the party receiving the rent and not of the party paying it must be looked at in considering the question of waiver, and that unless the jury were of opinion that the rents in that case received were received unconditionally and unreservedly, they should find no waiver." The jury under that direction had found that there was no waiver of the forfeiture relied on; but their Lordships, taking a different view, "did not deem it necessary to send down the case for a new trial, because the question of waiver really depended on undisputed facts, from which the proper legal inference to be drawn was in their opinion clear:" viz., that there had been a waiver.

The principal authority on the subject is Croft v. Lumley, 5 E. & B. 648. In that case, which was an action of ejectment to recover the possession of the Opera House, the Court of Queen's Bench considered that the receipt by the lessor of money tendered to him as rent was in point of law the receipt of rent, and a waiver of a forfeiture which had (according to the view taken by that court of the facts) been previously incurred, although the lessor, both before the tender and on taking the amount, unequivocally expressed his intention to accept the money only as compensation for the use of the land; the court in coming to this decision applied to the case the rule non quod dictum sed quod factum est in jure inspicitur. The judgment in this case for the defendant was affirmed in the Exchequer Chamber and House of Lords (5 E. & B. 682; 6 H. of L. C. 672), but only on the ground that there had been in fact no forfeiture of the lease. In the House of Lords, where one of the questions submitted to the judges related to the point of waiver, eight out of the nine judges who attended were of opinion that, if there had been any forfeiture, it had been waived by the receipt of the money which was offered as rent, and as rent only. But the peers who decided the case (Lords Cranworth and Wensleydale) were both of opinion that there had been no forfeiture of the lease, so that the question of waiver became immaterial, and Lord Cranworth observed that he gave no opinion upon this point. Lord Wensleydale, after questioning whether there had been any waiver, said that he thought that it was a question of fact, and not of law, whether the transaction in that case amounted to a payment and receipt of rent, and that he was led to suppose that it did not, as the money was not redemanded when the lessor declared that he would only take it as compensation. His lordship appeared to be of opinion that the rule solvitur in modo solventis is only applicable to the case of a payment in respect of one of two debts. Croft v. Lumley cannot, therefore, be considered to have decided that, under such circumstances as existed in that case, a waiver must be held to have taken place, either as a matter of law or as a necessary inference of fact. And see, per Hannen, J., Toleman v. Portbury, L. R. 6 Q. B. 245, 248. See, however, per Lush, J., Griffin v. Tomkins, 42 L. T. 361. There is no doubt that when there are two debts, and money is paid by the debtor on account of one of them, the payment discharges that debt, although at the time of taking the money the creditor says that he receives it on account of the other. In an anonymous case, Cro. Eliz. 68, "the defendant being indebted to the plaintiff upon bond, and also upon book, for wares had of him, tendered the money due on the bond at the day, which the plaintiff accepted, and said it should be for the book debt, but the defendant said he paid it upon his bond, and not otherwise. The plaintiff crossed his book as discharged, and brought debt on the bond, but it was adjudged against him, for the payment is to be in the manner the defendant would make it, and not as the plaintiff would accept it." also Bois v. Cranfield, Sty. 239; Viner's Ab. Tit. "Payment," M. 1.]

It has been laid down that there is a difference between cases where the

lease is on breach of the condition to be void and those where it is only to be voidable on the lessor's reëntry. In the latter case, acceptance of rent operates as a waiver of the landlord's right to reënter, but in the former, the lease becoming void immediately upon the breach of the condition, it has been laid down by great authorities that no subsequent acceptance of rent will set it up again. This distinction is laid down by Lord Coke, 1 Inst. 214, b., in the following terms: "Where the estate or lease is ipso facto void by the condition or limitation, no acceptance of the rent after can make it to have a continuance, otherwise it is of a lease or estate voidable by entry." The same law is laid down equally strong in Pennant's Case, 3 Rep. 64; in Browning and Beston's Case in Plowden; see, too, Finch v. Throckmorton, Cro. Eliz. 221; Mulcarry v. Eyres, Cro. Car. 511; Doe d. Simpson v. Butcher, Dougl. 51, et notas. But this distinction was never, before the 7 & 8 Vict. c. 76, and the 8 & 9 Vict. c. 106, applied to any, save leases for years, for if a lease for lives contain an express condition to be void upon the breach of any covenant by the lessee, still it is in contemplation of law only roidable by reëntry; for it is a principle that an estate which begins by livery can only be determined by entry. Browning and Beston's Case, Plowd. 133. Doe v. Pritchard, 5 B. & Ad. 765. Since the statutes referred to, estates for life may commence without livery, and to such estates the reasoning above seems inapplicable.

Even in the case of a lease for years, where the direction is that it shall become void on breach of the condition, it will only be void at the option of the lessor; for the lessee shall not take advantage of his own wrongful nonperformance of his contract, in order to destroy the lease, which had perhaps turned out a disadvantageous one. Doe v. Bancks, 4 B. & A. 401; Read v. Farr, 6 M. & S. 121; and see Malins v. Freeman, 4 Bing. N. C. 395; Hyde v. Watts, 12 M. & W. 254 [and Davenport v. The Queen, 3 App. Cas. 115; 47 L. J. P. C. 8; Att.-Gen. of Victoria v. Ettershank, L. R. 6 P. C. 354; 44 L. J. P. C. 65; Hughes v. Palmer, 19 C. B., N. S. 393; 34 L. J. C. P. 279, decided on a similar principle]; nor can any third person treat it as void until the landlord has declared his option. Roberts v. Darey, 4 B. & Ad. 664. In that case, in trespass quare clausum fregit. the defendant pleaded a license from a previous owner of the fee. Replication, that the license was, on breach of a certain condition, "to cease, determine, and become utterly void and of no effect," and that the condition had been broken and the license thereupon become void. Demurrer, and judgment for the defendant on the ground that, according to Doe v. Bancks and Read v. Farr, the license was determinable only at the option of one who had not signified such option. In Doe v. Bancks and Read v. Farr the lease was, by the terms of it, to be utterly void to all intents and purposes. But in Arnsby v. Woodward, 6 B. & C. 519, where, in addition to the words rendering the lease void, it was stated, "that it should be lawful for the lessor to reënter and expel the tenant," the court held that the addition of those words showed that it was the intent of the parties that the lease should be only voidable by reëntry; and consequently that the landlord had, by a subsequent receipt of rent, waived the forfeiture; and in Doe v. Birch, 1 M. & W. 403, a clause that, on the breach of certain stipulations, "it should be lawful for the lessor to retake possession of the premises, and that the agreement should be null and void," was held to have the same effect, and to admit the question of waiver. See also Dakin v. Cope, 2 Russ. 170. This shows with what strictness the courts will read such a proviso in order to prevent an absolute forfeiture. Indeed, in Arnsby v. Woodward, Lord Tenterden said, that, supposing the proviso had been in the very same words as in Read v. Farr and Doe v. Bancks, he should have still thought that a receipt of rent by the landlord would be an

admission that the lease was subsisting at the time when the rent became due, and that he could not afterwards insist upon a forfeiture previously committed; and his lordship said, that to hold the contrary would be productive of great injustice, for it would enable a landlord to eject a tenant after he had given him reason to suppose that the forfeiture was waived, and after the latter had, on that supposition, expended his money in improving the premises. We must therefore look on this distinction between the possibility of waiving the breach of a condition which is to render the lease void, and that of one which is to render it roidable, as shaken; and indeed in Roberts v. Davey, 4 B. & Ad. 667, Sir W. Follett argued that it had been virtually overruled [and that the same effect practically is produced by the reluctance of the court to construe any words, however strong, as rendering the lease void is shown by Davenport v. The Queen, 3 App. Cas. 115; 47 L. J. P. C. 8. See also Att.-Gen. of Victoria v. Ettershank, L. R. 6 P. C. 354; 44 L. J. P. C. 65; and James v. Young, 27 Ch. D., at p. 666, per North, J.].

Still there is no express decision to that effect, unless Roberts v. Davey [or Davenport v. The Queen be so considered; nor does it appear a necessary consequence, that, because the tenant is prevented from taking advantage of his own wrong by insisting that the lease is absolutely void, it shall therefore be taken to be only voidable when that construction makes for the tenant and against the landlord; and when we consider the high authorities adducible in support of the distinction in question, and their analogy to the cases in which it has been determined that no acceptance of rent by a remainder-man will confirm a lease void as against him, Simpson v. Butcher, Dougl. 51, et notas; Jenkins v. Church, Cowp. 483, we may conjecture that it will not be quietly allowed to become obsolete: and that further controversy may arise upon the question, whether the landlord, in case of a stipulation that the lease shall become void on breach of a condition which has been broken, is precluded by a subsequent receipt of rent from treating the lease as determined. On that question the words of Lord Coke are express, that "where the lease is ipso facto void by the condition, no acceptance of rent after can make it to have a continuance," 1 Inst. 214; and see also the other authorities above cited.

On the other hand, the [cases] of Roberts v. Darey [and Darenport v. The Queen, are extremely strong. [In the former case] the person seeking to treat the license as void was not the licensee nor any one connected with him in interest; he was not taking advantage of any wrong done by himself; nor was he enabling the licensee to do so, which differs the case from Read v. Farr, where the defendant, who sought to take advantage of the tenant's wrongful act, was connected with him in interest; so that (unless there be a difference between the right of a landlord to consider the lease absolutely void before any expression of his election, and that of a third party to do so), Roberts v. Davey is no doubt an authority that it is only voidable in point of law, and with relation to all persons, including the landlord. [Whilst in the case of Davenport v. The Queen, no such difference was held to exist: but on the contrary the same construction was applied even against the Crown as landlord, and where the words creating the forfeiture were contained in an act of the Queensland legislature. See also Att.-Gen. of Victoria v. Ettershank, L. R. 6 P. C. 354; 44 L. J. P. C. 65.] If the landlord as well as the tenant must treat it as voidable, no doubt the receipt of rent may operate as a waiver of the forfeiture [and such was held to be the case in Davenport v. The Queen, sup.].

Perhaps the true rule may be ultimately held to be, that the effect of the proviso rendering the lease *void* is only to dispense with *entry*, and to substitute for it any formal expression of the lessor's election to avoid the lease. See *Bowser*

v. Colby, 1 Hare 109. On the question what is a sufficient entry where entry is requisite, see Doe d. Hanley v. Wood, 2 B. & A. 724; Doe v. Pritchard, 5 B. & Ad. 765; Doe v. Williams, ibid. 783; Doe v. Glenn, 1 A. & E. 49; 3 N. & M. 837, S. C., differently reported; Turner v. Doe d. Bennett, 9 M. & W. 646, per curiam; Doe d. Bennett v. Woodroffe, 10 M. & W. 608. [Baylis v. Le Gros, 4 C. B., N. S. 537.]

Although acceptance of rent falling due after a forfeiture operates as a waiver, yet acceptance after forfeiture of rent which became due before the forfeiture will not do so [Price v. Worwood, 4 H. & N. 512; Green's Case, Cro. Eliz. 3; Cronin v. Rogers, 1 Cab. & E. 348 (though payment and receipt of rent may, of course, be evidence to establish a new tenancy subsequent to the forfeiture, Evans v. Wyatt, 43 L. T., N. S. 176); for there is no inconsistency in accepting rent due before the supposed determination of the estate, per Crompton, J., 4 B. & S. 337, 352; 33 L. J. Q. B. 11; but semble, it is otherwise in the case of a distress, for that acknowledges a tenancy subsisting at the time of the distress, ibid.; see Plowden, p. 133, 14 ass. there cited; unless the statute of 8 Anne, c. 14, extending the right to distrain for six months after the determination of the lease, applies to the case, for the statute has been thought not to apply to cases of forfeiture. See Doe v. Williams, 7 C. & P. 322; Grimwood v. Moss, L. R. 7 C. P. 360; 41 L. J. C. P. 239. But if the lessor sue in ejectment previously to the distress, the forfeiture would not be waived by the distress which, whether justifiable under the statute of Anne or not, could not alter the previous election of the lessor to determine the lease, and would apart from statute be a simple act of trespass, Grimwood v. Moss, L. R. 7 C. P. 360. In ejectment for non-payment of rent brought under statutes requiring proof that there was no sufficient distress to countervail the arrears due, distress for rent due before breach of condition is not a waiver, for, as Lord Mansfield says, in Brewer v. Eaton, 3 Dougl. 230, it is made in order to complete the plaintiff's title given him by statute. See also Cotesworth v. Spokes, 10 C. B., N. S. 103, where in such a case distress, for rent accruing due subsequently to the breach of a condition, was held a waiver of the right to reënter for such breach.] The lessor [does not] waive his right to recover rent [due before the forfeiture] in an action, although the words of the condition may be that the lessor shall have the premises again, "as if the indenture of lease had never been made." "The proper construction of such a condition is, that from the time of reëntry the lessor shall have the land again, as if the indenture had never been made." Hartshorne v. Watson, 4 Bing. N. C. 178.

There is some distinction, in respect of waiver, between a condition against under-letting and one against assignment; for in the former case, if the lessee under-let and the lessor accept subsequently accruing rent, so as to waive the forfeiture, still, if the lessee, after the expiration of that term, make another under-lease, the lessor may reënter, Doe v. Bliss, 4 Taunt. 735; but if the lessor were, by acceptance of rent, to waive the forfeiture incurred by the lessee's assignment, there would [have been, before the recent statutes referred to above] an end of the condition altogether, exactly as there would [have been] if he had licensed it. Lloyd v. Crispe, 5 Taunt, 249; 1 Wms. Saund. 445, note y. See 5 B. & Ad. 781. And it has been thought that, even if the lessor were expressly to license the lessee to under-let, still the lessee might incur a forfeiture by making a fresh under-lease after the expiration of that licensed; for that the license would in that case only operate as a suspension of the condition, and a condition may be suspended, though it [could not, before the recent statutes] be apportioned. 1 Wms. Saund. 445, note y.

[By 22 & 23 Vict. c. 35, s. 3, where the reversion on a lease is severed and the

rent is legally apportioned, the assignee of each part of the reversion is entitled in respect of the apportioned rent to the benefit of the condition, and by the Conveyancing Act, 1881, s. 12, it is provided with respect to leases made after the commencement of that act, "that notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of reëntry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the several parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease." As to the apportionment of a rent charge or rent service divided by act of the parties, see per Byles, J., 17 C. B., N. S. 350.] The assignee of part of the reversion in the entire of the land may take advantage of a condition. Wright v. Burroughes, 3 C. B. 684. See as to the indivisibility of a condition precedent, Neale v. Ratcliffe, 15 Q. B. 916.

The American courts have decided that a condition can only be destroyed by express license, and that the waiver of a forfeiture by acceptance of rent or the like, operates pro hâc vice tantum, and leaves the condition effectual for the future.

[In Walrond v. Hawkins, L. R. 10 C. P. 342; 44 L. J. C. P. 116, the lease contained a covenant by the lessee not to assign or demise to or permit any other person to occupy the premises without the consent in writing of the lessor, and a clause for reëntry on breach of any of the covenants. The lessee without permission sublet for one year from the 31st January, 1873, but the lessor with knowledge of the subletting distrained for and accepted the Michaelmas rent on the 30th September, 1873. The sublessee continued in occupation, but the Court held that there was a waiver of the forfeiture in respect of the subletting for a year, and that the continuance in possession by the sublessee which the lessee could not prevent by reason of the sublease was not a recurring breach, and they distinguished on this point, Doe v. Woodbridge, 9 B. & C. 376, and Doe v. Gladwin, 6 Q. B. 953. See also the distinction drawn between Waldron v. Hawkins and Laurie v. Lees, 14 Ch. D., at p. 262, per Branwell, L. J.; and see as to the above principle, Griffin v. Tomkins, 42 L. T. 359, where Walrond v. Hawkins was followed.]

It need hardly be added that receipt of rent is no waiver of a forfeiture recurring by reason of a continuing breach of covenant. *Doe* d. *Baker* v. *Jones*, 5 Exch. 498. [Where, however, a breach of covenant not to do a particular act without license has continued for twenty years, and rent has been received throughout that period by the lessor, with full knowledge of the facts, a license may be presumed. *Gibson* v. *Doeg*, 2 H. & N. 615. And see *Miles* v. *Tobin*, 17 L. T. N. S. 432; 16 W. R. 465.]

With respect to what will amount to a breach of such conditions—When the condition was "not to assign, transfer, set over, or otherwise do and put away the indenture of demise or the premises thereby demised, or any part thereof," an under-lease was held no breach of it, Crusoe v. Bughy, 3 Wils. 234 [but an under-lease of the whole term amounts to an assignment, Beardman v. Wilson, L. R. 4 C. P. 57; 38 L. J. C. P. 91.] So, of an equitable mortgage, Ex parte Drake, 1 M. D. & De G. 539; Doe v. Hogg, 4 D. & R. 226. A condition not ta

"set, let, or assign over the demised premises, or any part thereof." comprehends under-leases: Roe v. Harrison, 2 T. R. 425; Roe v. Sales, 1 M. & S. 297; Doe d. Holland v. Worsley, 1 Camp. 20; and a covenant not to "let, set, or demise for all or any part of the term," assignments. Greenaway v. Adams, 12 Ves. 395. Letting lodgings was held by Lord Ellenborough not to be a breach of a condition not to under-let any part of the premises without the license of his lessor, Doe v. Laming, 4 Camp. 73. [Where two partners were joint lessees, it was held that an assignment by one of them to the other on the dissolution of the partnership was clearly a breach of a covenant not to assign. Varley v. Coppard, L. R. 7 C. P. 505. Secus where two partners covenanted not to "part with the possession of the demised premises or any part thereof to any person or persons," and on a dissolution of partnership one partner gave up sole possession to the other. Mayor, &c., of Bristol v. Westcott, 12 Ch. D. 461. A deed of assignment in trust for creditors registered under the Bankruptcy Act, 1861, s 194, was held to work a forfeiture in Holland v. Cole, 1 H. & C. 67; 31 L. J. Exch. 481.] An assignment by operation of law is no breach of a condition not to assign (ex. gr., if the lessee become bankrupt, or the lease be taken in execution, Philpot v. Houre, 2 Atk. 219; Doe v. Beran, 3 M. & S. 353; Doe v. Carter, 8 T. R. 57 [Winter v. Dumergue, 14 W. R. 281, or if the land be taken under the Lands Clauses Consolidation Act, 1845. Slipper v. Tottenham Ry. Co., L. R. 4 Eq. 112; 36 L. J. Ch. 841. Bailey v. De Crespigny, L. R. 4 Q. B. 180; 38 L. J. Q. B. 98]) unless such an event be brought about by the fraudulent procurement of the lessee himself. Doe v. Carter, S T. R. 300. See Doe v. Hawkes, 2 East, 481. And in Doe v. Powell, 5 B. & C. 308, it was held, that an assignment, which was an act of bankruptcy, and was avoided by subsequent proceedings in bankruptcy, did not, as against the assignees, create a forfeiture, and that the assignees took the lease notwithstanding the temporary breach of the condition against assignment. But the lessor may, if he please, by the insertion of express words for that purpose, provided they be clear and distinct, for the court will not be astute to find them a meaning. Doe d. Wyndham v. Carew, 2 Q. B. 317, render even such an assignment a forfeiture. Roe v. Galliers, 2 T. R. 133; Davis v. Eyton, 7 Bing. 154. See Doe v. Hawkes, 2 East, 481; Doe v. Clarke, 8 East, 185; Doe v. David, 5 Tyrwh. 125; Cooper v. Wyatt, 5 Madd. 482; Yarmold v. Moorhouse, 1 R. & Myl. 364; R. v. Robinson, Wightw. 386 [Ex parte Gould, 13 Q. B. D. 454]. And [previously to the passing of the Bankruptcy Act, 1883, it was held that] the landlord reëntering for such a forfeiture [was] entitled to the emblements and fixtures. Davis v. Eyton, 7 Bing. 154. [Pugh v. Arton, L. R. S Eq. 626; but see now s. 55, sub-s. 3, of that act, and Ex parte Gould, 13 Q. B. D. 454; Ex parte Moser, 13 Q. B. D. 738, as to the landlord's right in this respect.] Marriage does not operate as a forfeiture. Anon., Moor, 21. Whether a devise be a breach of the condition not to assign, has been disputed. Fox v. Swann, Styles, 483; Dumper v. Syms, Cro. Eliz. 816; Berry v. Taunt, ib. 331. And see some observations in Doe v. Beran, 3 M. & S. 353, and the argument in Doe v. Evans, 9.A. & E. 724.

It has been thought that if executors and administrators be not expressly named in the condition, an assignment by them would not create a forfeiture. Anon., Moor, 21; Seers v. Hind, 1 Ves. jun. 295 [but see per James, L. J., in Williamson v. Williamson, L. R. 9 Ch. 732]. The mention of assigns includes administrators, for they are assigns in law. Moor's Case, Cro. Eliz. 26 [and Thornhill v. King, ib. 757]. See Cox v. Browne, Cha. Rep. 170. So are executors, Wollaston v. Hakewill, 3 Scott, N. R. 593; Sleap v. Newman, 12 C. B., N. S. 116; even de son tort, Paull v. Simpson, 9 Q. B. 365. In Doe v. Beran, 3 M. & S. 353, it was held that the assignees of a bankrupt might assign, although

assigns were named in the condition, but in that case the assignees were directed by an order of the Court of Chancery to sell the lease, and the decision was before Copeland v. Stephens, 1 B. & A. 593, which established that the general assignment of a bankrupt's personal estate under the commission did not vest a term of years in the assignees until their acceptance of it. The Bankrupt Law Consolidation Acts (12 & 13 Vict. c. 106, s. 145, and 24 & 25 Vict. c. 134, s. 131) gave the assignees an election to accept or decline leases. And now under the Bankruptey Act, 1883 (46 & 47 Vict. c. 52), ss. 20, 54, 168, following in this respect the Act of 1869, it would seem that, immediately upon a debtor being adjudged bankrupt, the term vests in his trustee, or until the appointment of the trustee in the official receiver, subject to a right of disclaimer exercisable under s. 55.

The assignee of the reversion can maintain ejectment for forfeiture by breach of covenant to repair without notice to the tenant of the assignment. Scaltock v. Harston, 1 C. P. D. 106; 45 L. J. C. P. 125.]

A general condition not to assign, inserted in a lease, to a man, "and his assigns," was considered in Strickley v. Butler, Hob. 170, to be void for repugnancy, though it was admitted that a condition against assignment to a particular person would, even in such case, be good. But the former part of the above doctrine has been denied. Dennis v. Loring, Hard. 427; and in Wetherall v. Geering, 12 Ves. 511, the Master of the Rolls said, that assigns would in such a case be taken to mean such assigns as the lessee might lawfully have, viz. by license, and that there was no repugnancy. It is laid down, see Sheppard's Touchstone [by Preston], 131, Co. Litt. 223, a, that in an assignment of the entire interest in a term already created, a condition [generally, and not partially and upon due restraints] against assignment is void.

[Where a lease contained a covenant by the lessor not to withhold his license to assign unreasonably or vexatiously, it was held unreasonable and vexatious to withhold such license with the avowed object of obtaining a surrender of the lease, the proposed assignee being unobjectionable. See Lehmann v. McArthur, L. R. 3 Eq. 746; 37 L. J. Ch. 625. As to what is an "arbitrary" refusal of consent, see Treloar v. Bigge, L. R. 9 Ex. 151; Hyde v. Warden, 3 Ex. D. 72; 47 L. J. Ex. 121. In the former case where in a lease the lessee covenanted not to assign without the lessor's consent, "such consent not being arbitrarily withheld," and the proviso for reëntry on assignment without consent contained the words, "but such consent is not to be arbitrarily withheld," it was held that there was no covenant by the lessor not to refuse arbitrarily, but that on such arbitrary refusal the lessee might assign without the lessor's consent. Sear v. House Property Society, 16 Ch. D. 387; 50 L. J. Ch. 77, was a similar decision. And see Burford v. Unwin, 1 Cab. & E. 494. It would seem that a covenant not to assign without a license is not such a proper and usual covenant as that a lessor should be entitled to it apart from express stipulation, under an agreement for a lease. Church v. Bevan, 15 Ves. 258; Hodgkinson v. Crowe, L. R. 10 Ch. 622; 44 L. J. Ch. 680; Hampshire v. Wickens, 7 Ch. D. 555; 47 L. J. Ch. 242.

On a mere agreement not to under-let, no condition of reëntry on breach is implied. Shaw v. Coffin, 14 C. B., N. S. 372; Crawley v. Price, L. R. 10 Q.B. 302.]

A court of equity [would] not relieve against the forfeiture occasioned by breach of covenant not to assign, for it could not place the parties in statu quo; and besides, such a forfeiture must always be incurred by the wilful act of the lessee, and cannot be the result of accident, which seems to be the true foundation on which equity supports itself when relieving against forfeitures. Hill v. Barclay, 18 Ves. 63; Lovat v. Lord Ranelagh, 3 V. & B. 31; Davis v. Moreton, 2 Cha. Ca. 127; see Maddock's Cha. Prac. 2d Edit., vol. i. p. 31 [see Bamford v.

Creasy, 1 Giff. 675; 7 L. T., N. S. 187. And the relief provided in case of forfeiture under s. 14 of the Conveyancing Act, 1881, is not extended to a forfeiture so occasioned, nor to one occasioned by a bankruptcy or execution (sub-s. 6), nor to a case of non-payment of rent (sub-s. 8). By sub-ss. 1, 2, and 9 of that section it is provided as follows: - (1.) A right of reëntry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. (2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of reëntry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit. (9,) This section applies to leases made either before or after the commencement of this Act and shall have effect notwithstanding any stipulation to the contrary.

With respect to what will amount to a breach of other kinds of conditions than those against assignment, so as to produce a forfeiture, see Stevens v. Copp, L. R. 4 Ex. 20; 38 L. J. Ex. 31; Toleman v. Portbury, L. R. 5 Q. B. 288; 39 L. J. Q. B. 136; Wadham v. Postmaster-General, L. R. 6 Q. B. 644; 40 L. J. Q. B. 310; Wooder v. Knott, 1 Ex. D. 124, 265; 45 L. J. Ex. 313, 884; German v. Chapman, 7 Ch. D. 271; 47 L. J. Ch. 250; General Share Co. v. Wetley Co., 20 Ch. D. 260; Weston v. Metropolitan Asylum District, 9 Q. B. D. 404; 51 L. J. Q. B. 399. As to when there can be a forfeiture by breach of a negative covenant, see West v. Dobb, L. R. 5 Q. B. 460; Evans v. Davis, 10 Ch. D. 747; 48 L. J. Ch. 223.

The onus of proof lies on the party seeking to establish a forfeiture: $Toleman\ v.\ Portbury,\ sup.]$

That restraints upon the use or alienation of granted premises may within certain limits be lawfully imposed, is well settled and is a reasonable recognition of the owner's rights to deal with his property as he pleases, provided the restraints are not unlawful or against public policy. Broadway Bank v. Adams, 133 Mass. 170; Nichols v. Eaton, 91 U. S. 716. And undoubtedly the modern policy of the law tends to bring such restraints within reasonable rules of operation, neither denying them enforcement, nor suffering this to go beyond the essential limits of the grant or contract to which they are annexed.

With both of these positions of the modern law the rule in Dumpor's case is in conflict. It was in the first place a denial of the reasonable right of the owner to protect his property, while demised; and yet effected a rigid enforcement of restraint on alienation, while ostensibly removing one. For obviously if the effect of the license were to defeat the condition and not leave it operative upon the assignee as its terms required, no license would be granted. In the second place it asserted the uncontrollable entirety of a condition, treating it, though a creature of contract, as beyond the power of the contracting parties to mould in conformity to the character of the grant; the fruit, as it has been justly characterized, of the "mischievous scholastic logic" which produced an "antiquated system of endless distinctions without solid differences." Williams, Real Prop. 273. Furthermore it had no just foundation in authority, and has never since been confirmed by a decision in pari materia, though often inconsiderately referred to.

A restraint upon the alienation of premises granted in fee, whether by way of prohibition, exception, reservation, or condition, is of course void and has been so held from the earliest days of the common law until now. Shep. To. 129; Co. Litt. 223, a; Case v. Dwire, 60 Iowa 442; Murray v. Green, 64 Cal. 363; Hartung v. Witte, 59 Wisc. 285; Cowell v. Springs Co., 100 U. S. 55, 57; Munroe v. Hall, 97 N. C. 206; Hall v. Tufts, 18 Pick. 455. Because, at least, since the statute Quia Emptores, 18 Edw. 1, ch. 1, the grantor has no reversion, or possibility of reverter for the benefit of the condition to attach to, Co. Litt. 223, a; and such a restraint is repugnant to the character of the estate granted. Gray Restr. Alien, s. 21. Hartung v. Witte, supra. In De Peyster v. Michael, 6 N. Y. 467, the same rule was applied where the restraint was a condition to enforce a charge of one quarter of the price received in a sale to any one but the lessor in fee. See also King v. Burchell, Amb. 379. So a condition that a tenant in tail should not suffer a recovery was bad. Co. Litt. 224 a, 233 b.

Where, however, the grant is for life or years, while a mere prohibition to alien has been denied efficacy in the former, in some cases, McCleary v. Ellis, 54 Iowa 311; Bridge v. Ward, 35 Wisc. 687; and asserted in others on the ground that alienability is no necessary incident of a life estate; Camp v. Clary, 76 Va. 140, 144; 2 Minor Inst. 252; Nichols v. Eaton, 91 U. S.

716, 725; there is no doubt that a condition of forfeiture may be annexed to any alienation of either estate, Camp v. Clay, supra; De Peyster v. Michael, 6 N. Y. 467; the principle that the grantor's or lessor's reversion is an estate to which such a condition may be attached applying to both.

Where the lease was in fee it was denied that after the New York statutes of 1779 and 1787 had reënacted the stat. Quia Emptores, there was any reversionary interest in the lessor; De Peyster v. Michael, supra. But in numerous elaborately considered cases it has been decided that his interest was sufficient to carry to his assignee the benefit of a condition for payment of rent; at first under the Act of 1805, c. 98, repealing the earlier statute, Van Rensselaer v. Ball, 19 N. Y. 100; then specially by force of the Act of 1846, ch. 274; Van Rensselaer & Slingerland, 26 N. Y. 580; and finally upon the ground that the earlier statutes, reënacted in 1860, only applied to conditions in law. Van Rensselaer v. Dennison, 35 N. Y. 393. And see Tyler v. Heidorn, 46 Barb. 439; Lyon v. Adde, 63 Barb. 89; Van Rensselaer v. Barringer, 39 N. Y. 9; Cruger v. McLaury, 41 N. Y. 219.

Before coming to the cases in which Dumpor's Case has been mentioned, it is itself to be briefly considered. The ground of the doctrine which that case contravenes is that the very nature of an estate demised for years only, entitles the lessor by any reasonable restriction to secure to himself a selection of tenants, and protect his reversionary estate; this being not merely the return of the possession at the end of the lease, but the title until such return.

It was held in Dumpor's Case that he could not do this by a condition in terms applicable to and contemplating a succession of assignments, the condition there being express that the lessee and his assigns should not alien without license. This inability was based, first, on the asserted entirety of a condition, and its incapability for apportionment, though it was admitted that it could be suspended, Moore 91 pl. 225; Pain v. Malory, Cro. El. 832; Lee v. Arnold, 4 Leon. 27, 28; and, secondly, that by the licensed alienation an unrestricted estate was conveyed. The latter reason is simply a petitio principii, for the license authorized the lessee to assign what he had, which by the very terms of the demise was an estate restricted against alienation by his assigns. He could transfer nothing else. As was said by

Nelson, C. J., in Dakin v. Williams, 17 Wend. 447, 458: "The common-sense view of the license to the lessee only, and the one coinciding with the apparent intent of the parties, would seem to be that it merely enabled him to alien the premises, leaving the operation of the covenant in the lease in full force against the assignee. To say that it empowered him to assign an absolute estate to the extent of his interest free from condition is assuming the point in question." The first ground that the entirety of a condition does not admit of apportionment as to the lessee - had but scanty foundation in authority. That the reversion could not upon apportionment carry the condition to each parcel reversioner, Pain v. Malory, Cro. El. 832, was clear law. But the only suggestion of the other rule was in the reference to Leeds v. Crompton in 1 Rolle Abr. 472; the regular report of that case, Godb. 93, containing no mention of the point, and in two preceding cases, Dyer 334; Ib. 152; an assent to a parcel alienation by the lessee being held no dispensation of the condition as to the residue. Shep. To. by Preston 145. Such an apportionment of the condition also took place on parcel alienation by act of law; Dumpor's Case, 4 Co. 119, 120; Appowel v. Monnoux Moore, 97; S. C. Winter's Case, Dyer 308; Co. Lit. 215, a; Viner Abr. 300; Anon. Godb. 2; Anon. Moore, 91; even of the reversion; Dyer 308 and cases supra; Cruger v. McLaury, 41 N. Y. 219, 225; and also by wrong of the lessee, Ib. And even if the technical rule against apportionment was operative where the condition was originally entire and was subsequently apportioned by the act of the parties, there was no such entirety when its original creation necessitated or contemplated apportionment. In Wigly v. Blackwal, Cro. El. 780; Shep. To. 147; where a feoffment was on condition that besides certain payments a lease also should be made and the latter act was impossible, the condition was apportioned and held to apply only to the payments. The rule of entirety, therefore, clearly had no bearing where the condition was originally made divisible, by being made applicable to successive assignments.

It was asserted in Dumpor's Case, as a necessary corollary to the doctrine there maintained, that, if in the original condition there was one excepted mode of alienation permitted on license, a license to alien in this mode discharged the condition; or in other words that one dispensation in an authorized

mode defeated the condition as against unauthorized modes. This was also asserted by Lord Coke in Whitchcocke v. Fox, 1 Rolle 389, saying: "quant l'assignment est une foits fait solonque le condition, le condition est dispense;" although "lauters justices semble a douter de cest point." But the earlier decision in Dyer 152 is express to the contrary; and the notion, if ever law, was overruled in Lloyd v. Crispe, 5 Taunt. 249. The ground taken by Ld. Eldon and the common-law courts in regard to Dumpor's Case is surprising, considering their denial of its correctness and that it was only recognized to be distinguished and departed from. If it "had been law for so many centuries," it is singular that it is never mentioned in the reports from Ld. Coke's time till Ld. Eldon's: and to have even then reversed it would have unsettled no titles, for it did not touch title at all, but only a chattel interest in lands.

This somewhat extended comment upon its soundness is justified by the inconsiderate approval it has received from text writers and courts. The English cases are examined in 7 Am. Law Rev. 616, 626-631. But as it has been cited in the courts of America in comparatively recent cases, though with apparently but little regard to its real point, these will be stated shortly; and it will appear that it has to support it only a series of dicta, unbroken by a single decision on the same facts.

In Bleecker v. Smith, 13 Wend. 530, it is referred to with doubt. It was not in point; as that was a clear case of continuing condition, which the waiver was held not to discharge. In Dakin v. Williams, 17 Wend. 447; 22 Id. 201, it is pointedly condemned even on the ground of apportionment. The question there, however, was on a covenant merely. There was no condition. In Siefke v. Koch, 31 How. Pr. 383, where it was approved, it was not in point, the suit there being for rent on a covenant, and the court citing it as authority that the covenant was discharged, which Dumpor's Case did not decide and which is not law. To Chipman v. Emeric, 5 Cal. 49, the same comment applies. Ludlow v. N. Y. & H. R. R., 12 Barb. 440, was simply estoppel. There was substantial performance of the conditions, only not in the time limited, but after this time full performance was insisted on and given, and grantee went to large expense besides, with grantor's knowledge and assent. In Lynde v. Hough, 27 Barb. 415, the condition was against

under-letting and was sustained; and the reference to Dumpor's Case admittedly obiter. McKildoe v. Darracott, 13 Gratt. 278, was also under-letting. In Murray v. Harway, 56 N. Y. 337 (see also Conger v. Duryee, 90 N. Y. 594, 599), the condition, so called, though none appeared in the statement of facts, was limited to the lessee simply, and assigns were not mentioned. The same was the case in Dougherty v. Matthews, 35 Mo. 520; and also in Pennock v. Lyons, 118 Mass. 92, as appears by the original record in that case. In Porter v. Merrill, 124 Mass. 534, on a lease by A to B containing a covenant and condition against B's assigning without leave in writing, B assigned to C with the written consent of the lessor, and, after C's subsequent assignment to D without such written consent, the lessor accepted rent of D continuously. E, a sub-tenant of C, after paying some rent to D, declined to do so longer, because D had received no written assent to the assignment to him. Obviously E was estopped by having paid rent to D, to deny his title; and it seems clear that D had a perfectly good title because the lessor accepted rent from him after the breach and continued to do so throughout. The court only say, "The consent of the lessors once given "-it is not said to whom - "and their acceptance of rent from Merrill amounted to a waiver of the covenant [sic] not to assign." Nothing was said, or needed to be said, as to future assigns, and Dumpor's Case was not referred to and was not in point. In Dickey v. McCullough, 2 W. & S. 88, 100, Dumpor's Case is not referred to. It was merely said "that when a person once dispenses with a condition he cannot afterwards enter for a subsequent breach;" which is incontrovertible, but simply obiter, as there was no condition there. In Sharon Iron Co. v. Erie, 41 Penn. St. 341, a condition in a grant was predicated on two acts, one of which was duly performed; and for the other, which was to be done in a limited time, a different act, with extended time, was substituted with no saving of the original conditon. In Tenn. M. F. Co. v. Scott, 14 Mo. 46, it is even held that the doctrine that a condition for personal occupancy is discharged by the waiver or license is confined to land. But there seems no ground for this distinction.

It is, of course, clear upon the recognized principles of waiver that there is a complete bar to the further enforcement of a condition, which admits only a single breach, if such a breach has been either waived or licensed, or if the duty is continuous, when the waiver is later than any breach. Thus in McGlynn v. Moore, 25 Cal. 384, receipt of rent after a structure was completed waived defects in performance of a contract to build. So in Barrie v. Smith, 47 Mich. 130, permitting the grantee, in a deed conditioned against the use of the premises for the sale of intoxicating liquors, to build expensive improvements after a known breach. So Andrews v. Senter, 32 Me. 394, continuing to receive partial support under a condition to support. And Ludlow v. N. Y. & H. R. R., 12 Barb. 440; Guild v. Richards, 16 Gray 309; Garnhart v. Finney, 40 Mo. 449; Newman v. Rutter, 8 Watts 51, 55; Gomber v. Hackett, 6 Wisc. 323; Sharon Iron Co. v. Erie, 41 Penn. St. 341, and many other cases rest on the same ground.

In Merrifield v. Cobleigh, 4 Cush. 178, there was a grant in fee of a small parcel with a condition that, inter alia, a fence between that and the residue of grantor's land should be maintained and a right of reëntry was reserved for a "refusal or neglect" so to do. The grantor subsequently conveyed this residue to one who removed the fence and then reconveyed to the grantor; and it was held that the latter could not reënter; and properly, for the removal was by his own predecessor in title, and therefore his own act quoad the conditional grantee. So Pellatt v. Boosey, 8 Jur. N. S. 1107.

In Garver v. McNulty, 39 Penn. St. 473, the suit was to cancel for non-performance of condition a conveyance of land made with an agreement by grantee to support grantor. It was defeated because, while the grant was executed, the obligation to support was at most a covenant or executory counter undertaking by grantee, Co. Litt. 204 a. The plaintiff contended for a rescission. A similar ground has been urged in support of Dumpor's Case, on the fancied applicability of the principle that the lessor when reëntering is to be in of his old estate, and that if his own intermediate act or license renders it impossible that he can be revested with all that he demised he cannot enforce the condition. But this confounds two entirely distinct things. A reëntry is not a rescission. By the latter the parties are to be placed absolutely in statu quo. By the former the grantor or lessor merely takes the estate discharged of intermediate incumbrances created by the grantee only; Tracy v. Hutchins, 36 Vt. 225; Stanly v. Colt, 5 Wall 119,

165; Barker v. Cobb, 36 N. H. 344; or derivative rights, such as dower, courtesy, and the like, claimed under him; Shep To. 119, 121; Perkins §§ 311, 312; Northeut v. Whipp, 12 B. Mon. 72; 1 Atk. Conv. 258; Evans v. Evans, 9 Penn. St. 190; and without affecting what the grantor has himself sanctioned. Dyer 334; Nelson, C. J., Dakin v. Williams, 17 Wend. 447, 458. Thus in Lawrence v. Gifford, 17 Pick. 366, a grantor in fee was allowed to reënter, though after the breach of condition he had received a part of the purchase money.

To avoid the asserted rule of Dumpor's Case, the distinctions were taken that it applied only to single conditions, insusceptible of more than one breach; and that, further, though a license might dispense with a condition, a waiver would not if the condition were continuous. See Doe v. Bliss, 4 Taunt. 735, and other English cases examined, 7 Am. Law Rev. 626-631. There is no suggestion of these distinctions in Dumpor's Case; on the contrary, either of the conceptions, that there can be a continuous condition susceptible of repeated breaches or that after a breach the condition can again be set up by a waiver, is fatal to the inherent and immitigable entirety of a condition there asserted. On the other hand, the distinction between a license and a waiver is likely to mislead. A license which permits a breach is no more than a waiver which excuses it; unless the license itself purports to permit other breaches, by its terms. In Macher v. Foundl. Hosp., 1 Ves. & B. 188, a waiver by accepting rent of a breach of a condition not to carry on any trade was held restricted to the trade permitted and equivalent to "that sort of license which it would be prudent to give."

The distinction between a continuous and a single condition is well established in the courts of the United States, as well as of England. Conditions which have been held to be continuous besides those against under-letting; cases ante; Ireland v. Nichols, 46 N. Y. 413, which clearly contemplate repeated acts and therefore breaches, are those to keep the demised premises in repair, Bennett v. Herring, 3 C. B. N. S. 370; Block v. Ebner, 54 Ind. 544; to use rooms in a particular manner, Doe v. Woodbridge, 9 B. & C. 376; Farwell v. Easton, 63 Mo. 446; or keep a way open, Jackson v. Allen, 3 Cow. 220; to keep up a particular number of orchard trees, Bleecker v. Smith, 13 Wend. 330; or keep the premises insured, Doe v.

Shewin, 3 Camp. 134; Doe v. Ulph, 13 Q. B. 204; Doe v. Jones, 5 Exch. 498; Doe v. Gladwin, 6 Q. B. 953; or to provide support, Andrews v. Senter, 32 Me. 394; or to keep the premises free from encumbrances, Alexander v. Hodges, 41 Mich. 691.

In certain cases, Doe v. Woodbridge, 9 B. & C. 376; Doe v. Jones, 5 Exch. 498; Bleecker v. Smith, 13 Wend. 530; for example, the courts have spoken of a "continuous breach" or continuous cause of forfeiture. If by this it was meant that a breach susceptible of one waiver could of itself, by mere lapse of time after such waiver, again become a cause of forfeiture, this is clearly an error; and such is the natural meaning of the expression. On recurring to these cases, however, it will be found that it was really meant only that the duty was continuous, as in Doe v. Woodbridge, supra, of using the rooms in a certain manner only; and that the waiver excused what breaches had occurred up to the time of waiver; and a continued user in the prohibited manner was a new breach. In Doe v. Jones, supra, it was only held that the waiver discharged the time but not the duty of performance. In a recent case, Conger v. Duryee, 24 Hun 617, the court, evidently misled by the expression as used in those cases, held that a breach for non-payment of taxes was continuous; that the non-payment of the taxes due for one year was only excused up to the time of waiver, and that the same non-payment for that year would again become a breach if that particular tax remained unpaid. But this error was corrected by the Court of Appeals, in Conger v. Duryee, 90 N. Y. 594, in an able opinion, and it was decided that the breach by non-payment of one year's tax was waived once for all; and while the duty to pay taxes still continued, there was no new breach except by non-payment of another year's tax. In Crocker v. Old South Soc., 106 Mass. 489, on a condition of forfeiture of a pew if the holder "left" without offering to give up his pew, the latter duty was held continuous and not waived by the collection of taxes on the pew after the holder left. And where there are several distinct stipulations conditioned, a waiver of breach of one does not waive breach of another; Becker v. Werner, 98 Penn. St. 555.

While, however, the distinction between a condition against assigning and one against under-letting is clearly established, it has been held by the courts of New York and Massachusetts

that the presence of a right of reëntry for condition broken will convert a transfer of the lessee's entire interest into an underlease. Gansen v. Tifft, 71 N. Y. 48; Collins v. Hasbrouck, 56 Id. 157; Martin v. O'Conner, 43 Barb. 514; Dunlap v. Bullard, 131 Mass. 161; and notwithstanding the earlier case of Woodhull v. Rosenthal, 61 N. Y. 382, and the well settled English law to the contrary, Pluck v. Digges, 5 Bligh N. S. 31; Langford v. Selmes, 3 Kay & J. 220; Beardman v. Wilson, L. R. 4 C. P. 57; 2 Prest. Conv. 124; Doe v. Bateman, 2 B. & A. 168.

This seems the more noticeable in New York as the courts of that State have held strictly that the right of reëntry for condition broken created no estate or real interest, and not even a possibility of reverter, properly so called, but a chose in action only, De Peyster v. Michael, 6 N. Y. 467; Vail v. L. I. R. R., 106 N. Y. 283, and that until reëntry the title was wholly in the grantee or lessee, Ib.; Berryman v. Schumaker, 67 Tex. 312. In Massachusetts, indeed, as will be noticed more fully further on, a right of reëntry has been in several cases treated as a real interest which would pass by devise; Hayden v. Stoughton, 5 Pick. 528; Austin v. Cambridgeport Parish, 21 Pick. 215; Tilden v. Tilden, 13 Gray 103; and see Brattle Sq. Ch. v. Grant, 3 Gray 142, 147; or under the broad language of the statute, Mass. Gen. Stat. ch. 118, § 44, to an assignee in insolvency; Stearns v. Harris, 8 Allen 597; although in the same State the strictest view of the character of this right as a chose in action seems to obtain, and its transfer is held champertous and to defeat its exercise by either grantee of the condition or by the grantor. Rice v. B. & W. R. R., 12 Allen 141; where the language describing the right contrasts somewhat markedly with the description of it by the same learned judge in 3 Gray 147, supra.

That the right remaining in the grantor upon condition was thus regarded as a real interest may have influenced the same court in Gray v. Blanchard, 8 Pick. 284, in holding that a condition on one estate obviously intended for the benefit of an adjoining estate originally owned by the grantor was enforceable by him after he had parted with all interest in the latter, seems not improbable. Indeed, in a case shortly after, the same learned court spoke of the conditioned estate as revesting in possession (? interest) on forfeiture; citing Chauncy v. Gray-

don, 2 Atk. 616, 621; Massey v. Hudson, 2 Meriv. 130, 133, neither of which gives any countenance to such a doctrine; nor indeed can any authority be found qualifying the rule that a freehold revests only on entry or action equivalent thereto. Co. Lit. 214; Shep. To. 150. Chalker v. Chalker, 1 Conn. 7; Willard v. Henry, 2 N. H. 120; Vail v. L. I. R. R., 106 N. Y. 283, and cases post.

The decision in Gray v. Blanchard is rested partly also on the ground that the benefited estate belonged to the grantor's sister. But it is a somewhat singular reason to support a reëntry by the grantor for his own benefit, that the benefit of the condition was originally intended for another; and still more so in view of the fact, apparently not adverted to by the court, that the sister had conveyed away the benefited estate before the breach.

In Merrifield v. Cobleigh, 4 Cush. 178, already referred to, the court admit there should be a strict construction where the grantor retains no interest in the premises to be benefited by the condition, and the same is declared in Theolog. Soc. v. Atty.-Gen., 135 Mass 285. It seemed to be considered in the former case that if the condition intended such a benefit, it might pass, even at law, to the party acquiring such premises, as in the nature of an easement. Where, however, the title remains in the grantor, or where strict words of condition are used, and no controlling intent to benefit such estate appears, the condition is to be enforced as such only, that is, by the grantor or his heirs; Allen v. Howe, 105 Mass. 241; Clarke v. Brookfield, 81 Mo. 503; Pepin Co. v. Prindle, 61 Wisc. 301; Close v. Burl. & Mo. R. R., 64 Iowa 149.

Until such reëntry, if the estate is freehold, or avoidance in some form, if it is for years, the title remains wholly in the grantee; 1 Prest. Est. 48; Chalker v. Chalker, 1 Conn. 79; Winn v. Cole, Walker 119; Cross v. Carson, 8 Blackf. 138; Warner v. Bennett, 31 Conn. 468, 477; King's Chapel v. Pelham, 9 Mass. 501; Hubbard v. Hubbard, 97 Id. 188; Canal Co. v. R. R. Co., 4 Gill & J. 121; Phelps v. Chesson, 12 Ired. 194; Willard v. Henry, 2 N. H. 120; Thompson v. Thompson, 9 Ind. 323; Tallman v. Snow, 35 Me. 342; Ludlow v. N. Y. & H. R. R., 12 Barb. 440; Webster v. Cooper, 14 How. 488, 501; Vail v. L. I. R. R., 106 N. Y. 283; Adams v. Ore Knob Co., 4 Hughes 589.

That a condition was not only in its entirety beyond the capacity of the contracting parties to qualify or control,—as was maintained in Dumpor's Case, - but that it acted independently of their election also was laid down by Ld. Coke in Pennant's Case, 3 Co. 64 a. Here it was held that, while a freehold could only be determined by entry, a lease for years, if conditioned to be void, became so absolutely on breach; because, being created by contract, it ended by the terms of the contract, Co. Litt. 215 a; though against the election of the lessor to continue it. The lessee could therefore terminate it at will. But this is now settled otherwise, and the lease continues until the lessor elects to determine it. Clark v. Jones, 1 Denio 516; Roberts v. Geis, 2 Daly 535; Wildman v. Taylor, 4 Benedict 42; Ludlow v. H. & N. H. R. R., 12 Barb. 440; Phelps v. Chesson, 12 Ired. 194; Cartwright v. Gardner, 5 Cush. 273; Trask v. Wheeler, 7 Allen 109, 111; Bowman v. Foot, 29 Conn. 331; Read v. Tuttle, 35 Id. 25; Dermott v. Wallace, 1 Wall. 61, 65; Prout v. Roby, 15 Id. 471; although the other view was adhered to in Kenrick v. Smick, 7 W. & S. 41; Davis v. Moss, 38 Penn. St. 346, 353; Garner v. Hannah, 6 Duer 262, 270; Parmelee v. Oswego R. R., 6 N. Y. 74, 80; and see Beach v. Nixon, 9 N. Y. 35; Collins v. Hasbrouck, 56 N. Y. 157. Where the lease stipulates for a reëntry, one is necessary, Rogers v. Snow, 118 Mass, 118.

The necessity of an actual entry is regarded as dispensed with where the action of ejectment in its technical form prevails, the formal entry admitted by the consent rule sufficing. Hylton v. Brown, 1 Wash. C. C. 204; Rugge v. Ellis, 1 Bay 107, 111; Phelps v. Chesson, 12 Ired. 194; Shep. To. by Preston, 153; Fonda v. Sage, 46 Barb. 123; Den v. McShane, 13 N. J. 35; Siglar v. Van Riper, 10 Wend. 414; Sperry v. Pond. 5 Ohio 387; Ruch v. Rock Island, 97 U. S. 693, in a case arising in Illinois; and this is held the rule in New Jersey by long settled practice also; Southard v. Cent. R. R., 26 N. J. 13; Cornelius v. Ivins, Ib. 376, 386; McKelway v. Seymour, 29 Id. 321, 329. In Cowell v. Springs Co., 100 U. S. 55, it is placed by the court on the statute of Colorado.

In Pennsylvania, however, the courts have moulded the action of ejectment into a bill in chancery, in which, singularly enough, and contrary to the usual rule of equity, a forfeiture is decreed, but a conditional judgment is rendered; the

defendant having a day to redeem, Bear v. Whisler, 7 Watts 144. Thus in Dickey v. McCullough, 2 W. & S. 88, 96; the court say: "This is in form an action of ejectment, but in substance a bill in equity for an account of the profits of certain real estate, and to compel the reconveyance of the whole or part to the plaintiff. It is a remedy well understood in this State, and, although the machinery is not very well adapted to attain that object, yet, through the instrumentality of a jury, it has been effectually used to give equitable relief."

In Massachusetts, before the recent decision, Hodgkins v. Price, 137 Mass. 13, holding the action of ejectment in force in that State, the necessity of an entry to enforce a forfeiture before maintaining a writ of entry was held removed by statute; Mass. Rev. Stat., ch. 104 § 4; Austin v. Cambridgeport Parish, 21 Pick. 215; although the correctness of this view seems doubted in Stearns v. Harris, 8 Allen 597, 598. And in Maine the opposite view was taken of a similar statute; Rev. Stat., ch. 145 § 6; Marwick v. Andrews, 25 Me. 525, 530. Where, however, not superseded by statute or the frame of the action, entry is indispensable when the conditional estate is a freehold; Chalker v. Chalker, 1 Conn. 79; Stearns v. Harris, 8 Allen 597, 598; Shep. To. by Preston, 153; Carter v. Branson, 79 Ind. 14; Schulenberg v. Harriman, 21 Wall. 44; Vanwyck v. Knevals, 106 U.S. 360; and in Adams v. Ore Knob Co., 4 Hughes 589, 594, an entry is said to be necessary, even where ejectment is brought, but this seems not tenable.

Where, however, the grantor is already in possession no entry is required; Lincoln Bank v. Drummond, 5 Mass. 321; Hamilton v. Elliot, 5 S. & R. 375; Dickey v. McCullough, 2 W. & S. 88, 100; Davis v. Moss, 38 Penn. St. 346, 353; Hubbard v. Hubbard, 97 Mass. 188. It was held in this latter case, however, that the grantor must give notice to the grantee; and on the other hand that such possession is not conclusive as a reëntry, but waiver may be shown, Hubbard v. Hubbard; Guild v. Richards, 16 Gray 309, 317; or that the possession of the grantor is under a different right, Hancock v. Carlton, 6 Gray 39. In Andrews v. Senter, 32 Me. 394, however, while waiver was permitted to be shown, no notice was required to be given by the grantor in possession; as this possession was held to intend all rights he could claim under; Adams v. Ore Knob Co., 4 Hughes 589; Richter v. Richter, 111 Ind. 456. And

this seems the better opinion, as no notice was required before entry.

With the abrogation of the doctrine of avoidance set up by Pennant's Case, 3 Co. 64 a, the rules in respect to the determination of leases for years and of freeholds being thus brought into harmony and depending on the lessor's election, the question whether there is a waiver depends on the manifestation of that election. The act of distraining after a breach with knowledge thereof is conclusive, as this is a reassertion of the existence of the tenancy, Co. Litt. 211 b; Zouch v. Willingale, 1 H. Bla. 311; Jackson v. Allen, 3 Cow. 220; Jackson v. Sheldon, 5 Cow. 448; McKildoe v. Darracott, 13 Gratt. 278, though not, it would seem, when a distinct cause of forfeiture is reserved; Becker v. Werner, 98 Penn. St. 555. So the receipt of rent accruing due after breach; Newman v. Rutter, 8 Watts 51; Jackson v. Sheldon, 5 Cow. 448; Bowyer v. Seymour, 13 W. Va. 12; Bleecker v. Smith, 13 Wend. 530; Gomber v. Hackett, 6 Wisc. 323; Jackson v. Allen, 3 Cow. 220; Hunter v. Osterhoudt, 11 Barb. 33; Manice v. Millen, 26 Id. 41; Campbell v. McElevey, 2 Disney 574, 583; Cartwright v. Gardner, 5 Cush. 273, 281; Piscat. F. Co. v. Jones, 39 N. H. 491; Higbie v. Farr, 28 Minn. 439. But not of rent up to the time of forfeiture, Mattice v. Lord, 30 Barb. 382; Co. Lit. 211 b. And the same rule of waiver was applied to acceptance of rent accruing due after expiration of a notice to quit, in Collins v. Canty, 6 Cush. 415.

In the cases of Bacon v. West. Furn. Co., 53 Ind. 229, and Coon v. Brickett, 2 N. H. 163, it was declared that the same result would follow from receiving the rent whose non-payment occasioned the forfeiture. But this confounds equitable relief and legal waiver; and overlooks the lessor's right to have his rent exactly when due. See Lawrence v. Gifford, 17 Pick. 366. In Rump v. Schwarts, 56 Iowa 611: Deyoe v. Jamison, 33 Mich. 94, the waiver was by receipt of purchase money after time, and these cases have no bearing on a case of rent, where the lessee has had his equivalent by his occupancy. So Robinson v. Missis. R. R., 59 Vt. 426, 434. A dictum in the same direction in Tuttle v. Bean, 13 Met. 275, is corrected in Kimball v. Rowland, 6 Gray 224, where the inference of such waiver from the receipt was rebutted by this lessor's receiving it under protest. It is, however, not apparent

upon what ground a protest is necessary, or that any such inference would arise in its absence. The true view would seem to be that there is no waiver if there is no inconsistency of position, and clearly if the lessor ousted the lessee for non-payment of rent he would still be entitled to recover it. A condition of reëntry is not a substitute for, but merely a collateral proceeding to secure, the payment of the rent.

Further, it seems to follow that as a tenant after determination of his lease is liable as a tenant at sufferance, though not for rent as such; Ibbs v. Richardson, 9 Ad. & E. 849; Levi v. Lewis, 6 C. B. N. S. 766; Edwards v. Hale, 9 Allen 462; Merrill v. Bullock, 105 Mass. 486; Wright v. Roberts, 22 Wisc. 161; the lessor may receive compensation, though not technically rent, accruing after the expiration of a notice to quit or other decisive ending of the tenancy. At all events, as the question is one of election, when this has once been decisively made, as by ejectment commenced, it has been held that the receipt even of after accruing rent will not waive; Doe v. Meux, 1 Carr. & P. 346; Jones v. Carter, 15 M. & W. 718; and see Blish v. Harlow, 15 Gray 316; though a different view was taken in Gomber v. Hackett, 6 Wisc. 323, where accepting rent was held a waiver though received after suit commenced for repossession.

It still, however, remains the rule of law that when the condition is for payment of rent the precise formalities of a strict common-law demand must be complied with. McCormick v. Connell, 6 S. & R. 151, 153; Wildman v. Taylor, 4 Benedict 42; Van Rensselaer v. Jewett, 2 N. Y. 141, 147; Prout v. Roby, 15 Wall 471, 476; Chapman v. Harney, 100 Mass. 353. But this may be waived by the tenant, Ib.; and does not apply to a statutory proceeding for such non-payment. Kimball v. Rowland, 6 Gray 224.

But the well settled rule of equity that conditions looking merely to the payment of money will be relieved from in cases of accident or mistake is applied in cases of non-payment of rent. Skinner v. Dayton, 2 Johns. Ch. 526, 535; Livingston v. Tompkins, 4 Id. 415; Harris v. Troup, 8 Paige 423; Garner v. Hannah, 6 Duer 262; Bradstreet v. Clark, 21 Pick. 389; Sanborn v. Woodman, 5 Cush. 36; Stone v. Ellis, 9 Id. 95; Chadwick v. Parker, 44 Ill. 326, 330. In Bear v. Whisler, 7 Watts 144, and other cases in Pennsylvania (see Sharon Iron Co. v. Erie, 41 Penn. St 341), the same relief was given in the action

of ejectment, treated as a bill to foreclose and allowing a conditional judgment. A like relief was given in Massachusetts by stay of proceedings at common law; Fifty Assoc. v. Howland, 11 Met. 99. But this was in the absence of full equity jurisdiction. In Stevens v. Pillsbury, 57 Vt. 205, 209, where on payment of \$2500 a conditional restriction was imposed by the grantor on the use of a building as a hotel adjacent to one sold by him, it was held that on a breach, though not accidental, the court would treat the \$2500 as liquidated damages, and relieve the forfeiture. So Hull v. C., B. & P. R. R., 65 Iowa 713. In Stines v. Dorman, 25 Ohio St. 580, the court enforced by injunction a similar condition as an equitable restriction, although the conveyance contained an agreement by the conditional grantee to be responsible in damages for a breach. But as these were unliquidated, the equitable relief was not affected thereby.

If, on the contrary, the default is wilful, equity will not relieve. Hancock v. Carlton, 6 Gray 39, where the condition was that the grantee should assume and pay a mortgage made by grantor on the granted land; distinguishing Sanborn v. Woodman, supra. So Noyes v. Clark, 7 Paige 179; Baxter v. Lansing, Ib. 350, 352; Hill v. Barclay, 16 Ves. 402.

It is, however, no waiver of the lessor's right to reënter that he has taken other security for the rent, Brand v. Frumveller, 32 Mich. 215; nor for a grantor upon condition that he has received a mortgage from the grantee which he has entered to foreclose; at least, until the period for redemption has expired; Stuyvesant v. Davis, 9 Paige 427.

That conditions as such are restraints on alienation and their enforcement as such in accordance with the letter of the contract is often inequitable and contrary to the real interest of the parties, and beyond what is requisite to protect the interest of the grantor, has led to much wider interference by courts of equity in their operation and a more liberal interpretation of their terms by courts of law as well as of equity. Hence the language employed has been frequently construed to import a covenant, trust, charge, easement, or restriction, rather than a strict condition of forfeiture. "What by the old law would be deemed a devise on condition would now perhaps in almost every case be construed a devise in fee upon trust, and by this construction, instead of the heir taking advantage of the condition broken, the cestui que trust can compel an observance of

the trust by a suit in equity." Sugd. Pow. 123, 7 Lond ed.; Stanley v. Colt, 5 Wall. 119, 165.

In Rawson v. Uxbridge, 7 Allen 125, accordingly, the words "for a burial-place forever," in a grant of land to a town, "in consideration of love and affection and for divers other valuable considerations me moving hereunto," were held not to make a condition subsequent. This case and the earlier one of Packard v. Ames, 16 Gray 327, were, it is true, primarily rested on the absence of strict words of condition, "provided," "so as," "ita quod," or "on condition;" or of any clause of reëntry. But the rule is declared to be that the character of the intended restraint, and not the words in which it is couched, is to control. Sohier v. Trinity Ch., 109 Mass. 1; Stanley v. Colt, 5 Wall. 119; Brown v. Caldwell, 23 W. Va. 187; Farnham v. Thompson, 34 Minn. 330; and it is held that in no case will a deed "be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not enure specially to the benefit of the grantor and his assigns," 7 Allen 129; which is quoted and followed, Meth. Ch. v. O. C. Pub. Ground Co., 103 Penn. St. 608, 614. "If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose, etc., the answer is that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee; "7 Allen 129; Norfolk's Case, Dyer 138 b. In Gannett v. Albree, 103 Mass. 372, the stipulation in a lease that the demised premises were to be used "strictly as a private dwelling" was held to amount to a covenant only, which could be modified by consent. Episc. City Miss. v. Appleton, 117 Mass. 326, a "condition" that the grantee's land should always be used as a chapel was held not a condition, because coupled with another "condition" so called, requiring that a part of the land conveyed should remain open until a certain time. In a later case, Tobey v. Moore, 130 Mass. 448, this was said to be a restriction.

In two recent cases in Maryland, Reed v. Stouffer. 56 Md. 236, and Univ. Soc. v. Dugan, 65 Id. 460, 468, a different conclusion is intimated; and in the former obiter, in the latter directly, it is laid down that the words "for no other purpose or use whatever," in a deed to trustees of land for the purpose of

a burial-place for members of the sect called Dunkers, created a condition for which the grantor's heirs could reënter. This is the more noticeable that the breach of condition in each case was committed, not by the beneficiaries, but by those who held the legal title as their trustees. Apart from the difficulty of the grantor's heirs when entering being in of their old estate in land employed for such a use for many years with no breach committed, it might well be doubted if the title acquired by such entry would not still be subject to the trust originally created by a declaration still binding on the grantor's heirs as the cestui que trust had committed no breach. See, however, Bennett v. Culver, 97 N. Y. 250, where a similar conclusion was reached. In a later case in Maryland, however, Newsold v. Glenn, 47 Md. 489, a deed of land for the uses and purposes expressed in an ordinance passed to provide for the erection of a public building was held to carry a fee without limitation. The remark in Rawson v. Uxbridge, 7 Allen 125, 128, supra, that one element showing there was no condition subsequent there was that the expressed purpose was not for the grantor's, but for a general benefit, is relied upon in Horner v. Ch., M. & St. P. R. R., 38 Wisc. 165, 177, conversely to establish a condition, where, though there were no express words of condition, the grant to defendant was "only" and "solely" "for depot purposes," which grantor was shown to regard as for her benefit. But the general current of authority is that a conveyance only for a special use or purpose does not create a condition, whosesoever benefit is secured thereby. Cases supra: Taylor v. Binford, 37 Ohio St. 262; Seebold v. Shitler, 34 Penn. St. 133; Meth. Ch. Col. v. O. C. Pub. Gr., 103 Penn. St. 608 - distinguishing Kirk v. King, 3 Id. 436; Scheetz v. Fitzwater, 5 Id. 126 — Osgood v. Abbott, 58 Me. 135; Buff. Co. v. N. Y., etc., R. R., 10 Abbot, Pr. N. C., 107; Groat v. Moak, 94 N. Y. 115. In Atty.-Gen. v. Merrimack Co., 14 Gray 586, besides the purpose limited, there was an express proviso for reëntry, and in Hunt v. Beeson, 18 Ind. 380, where the words a "tanyard to be erected" were held to create a condition, the court rely on Hayden v. Stoughton, 5 Pick. 528, where there were, as is pointed out in Farnham v. Thompson, 34 Minn. 330, 337-8, strict words of condition. So in the late case of Stone r. Houghton, 139 Mass. 175, an "express stipulation" in a deed that a house should be erected within two years on the granted premises was held not

a condition; though the same provision was held in Langley v. Chapin, 134 Mass. 82, to create a condition, that word being used instead of "stipulation." Similar decisions to Rawson v. Uxbridge, supra, were made in Barker v. Dale, 3 Pittsb. 190; Neas App., 31 Penn. St. 293; Wheeler v. Dascomb, 3 Cush. 285; Gould v. Bugbee, 6 Gray 371; Emig. Aid Co. v. Adams, 100 U. S. 61 (though a stipulation of the same character had been called a condition in Foxcroft v. Mallett, 4 How. 353), and many other cases.

Even where the language and obligation are express to make a condition, a liberal interpretation has been adopted to avoid a forfeiture. See Mills v. Evansville, 58 Wisc. 135; Carter v. Branson, 79 Ind. 14; Lyon v. Hersey, 103 N. Y. 264; Gage v. Sch. Dist. N. H., 9 Atl. Rep. 387; Bradstreet v. Clark, 21 Pick. 389; French v. Quincy, 3 Allen 9; Henry v. Etowah, 77 Ala. 538; Brown v. Grant, 116 U. S. 207; Crane v. Hyde Park, 135 Mass. 147. Upon an express condition and a clear breach, however, a forfeiture will be enforced; Langley v. Chapin, 134 Mass. 82; Marble Co. v. Ripley, 10 Wall 339; Close v. Burl. R. R., 64 Iowa 149; Clarke v. Brookfield, 81 Mo. 503; Cong. Soc. v. Stark, 34 Vt. 243. In Blake v. Blake, 56 Wisc. 392, an agreement in a deed of land that the grantor, etc., should be supported, was held a condition subsequent, although neither with technical words of condition nor any clause of reëntry, mainly on the ground of its being a "beneficial" provision. Conveyances for support are very numerous, but, as a rule, are not on that account held to be on condition, except when clearly so provided, as in Bear v. Whisler, 7 Watts 144; Watters v. Bredin, 70 Penn. St. 235; Barker v. Cobb, 36 N. H. 344; Tracy v. Hutchins, 36 Vt. 225; Colwell v. Alger, 5 Gray 67; Hubbard v. Hubbard, 97 Mass. 188; Stark v. Smiley, 25 Me. 201; Marwick v. Andrews, Ib. 525; Thomas v. Record, 47 Id. 500; Birmingham v. Leson, 77 Id. 494; Berryman v. Schumaker, 67 Tex. 312; Drew v. Baldwin, 48 Wisc. 529; Delong v. Delong, 56 Id. 514. In Richter v. Richter, 111 Ind. 456, and Wilson v. Wilson, 86 Id. 472, the fact that a mortgage was given back, or that the grant contained what were called written "terms," was regarded as establishing a condition. In Birmingham v. Leson, supra, a grant "providing" grantee support grantor's widow was held on condition. So Marston v. Marston, 47 Me. 495; Thomas v. Record, supra. And such a conditional character may be evidenced by a separate agreement if contemporaneous, Wilson v. Wilson, 86 Ind. 472; Richter v. Richter, 111 Ind. 456; Bear v. Whisler, 7 Watts 144. It was also held in equity a conditional agreement where the grantee under a deed, absolute on its face, gave back to the grantor a lease for life and succeeded to a prior agreement in writing for the latter's support, of which he had notice, and to which he had assented. Tracy v. Hutchins, 36 Vt. 225. And where there is not a grant, but a devise, as a less strict rule obtains as to the words required to make a condition, a duty which in a grant would make at most a charge or covenant may be held on condition. Doe v. Cassadav, 9 Ind. 63; 13, 289; Lindsey v. Lindsey, 45 Id. 552. But where the grant is absolute and to take effect at once, and the agreement to support is called the consideration and is executory and future, it makes a covenant, sounding in damages only. Cook v. Trimble, 9 Watts 15; Harris v. Shaw, 13 Ill. 456; Martin v. Martin, 131 Mass. 547; Garver v. McNulty, 39 Penn. St. 473; Bortz v. Bortz, 48 Id. 386; Perry v. Scott, 51 Id. 124; Krebs v. Strout, 9 Atl. Rep. 469. But Risley v. McNiece, 71 Ind. 434, is contra; though in the same State it is held that the payment of rent in a lease is held never a condition, unless so in express terms; Brown v. Bragg, 22 Ind. 122. Obligations must be clearly mutual and dependent to form a conditional contract in the absence of express language to that effect; the rule of the common law being settled that only when the stipulation goes to the whole of the consideration on the other side does it form a condition thereto. Pordage v. Cole, 1 Wms. Saund. 320 c; Boone v. Eyre, 2 W. Bla. 1312; Gould v. Brown, 6 Ohio St. 538. Accordingly, in Krebs v. Strout, supra, where the consideration of the conveyance was support and a bond to pay a sum of money, there was held to be no condition. So in Aver v. Emery, 14 Allen 67, where the support was stipulated for in numerous details, it was held that it could not be intended that for breach of every one of these grantor could reënter. See, however, Parker v. Nichols, 7 Pick. 111.

Upon the same principle, the like restricted interpretation may be given even where the grant contains express terms of condition, if these are not clearly annexed to the whole grant. In Chapin v. Harris, 8 Allen 594, a conveyance made to a

railroad company of a strip of land adjoining their track and of the use of a brook contiguous and of a dam over the brook, "provided" the dam be kept as a street of defined width, was held not to be on condition, as the proviso applied only to qualify the easement of a dam. In Laberee v. Carlton, 53 Me. 211, a like conclusion was reached, where the words of condition were "not so connected with the grant as to qualify and restrain it." An application of a similar equitable principle at common law, in modification of the strict rules of entirety, allowed a recovery of the price of a building erected under an entire contract on another's land, though not accepted and notwithstanding deviations from the express contract. Hayward v. Leonard, 7 Pick. 181. Where, however, the grant shows sufficiently by its terms that the proviso of cesser or limit of use goes to the whole interest granted, this will be restrained accordingly. Keeler v. Wood, 30 Vt. 242; Robinson v. Missisquoi R. R., 59 Vt. 426; Sanborn v. Minneapolis, 35 Minn. 314.

We have seen that in the view of the common law a condition created neither a title to nor a right in property, but a chose in action only, although its enforcement clothed the grantor anew with the title. Shep. To. 153, Co. Lit. 202 a; De Peyster v. Michael, 6 N. Y. 467. And the grantor upon reëntry was said to be in of his old estate, the quality or modus created by the condition having preserved his relation to the estate during the whole period that it was in the grantee's possession. Hence in Austin v. Cambridgeport, 21 Pick. 215, 223, it is said that the possession of the grantee is not adverse to the grantor; and in Brattle Sq. Ch. v. Grant, 3 Gray 142, 148, the right of reëntry is called "a vested right which by its very nature is reserved to him as a present existing interest transmissible to his heirs."

Hence, probably, is derived the rule which generally prevails in America, that the exercise of the right of reëntry is not, in this respect at least, open to objection as creating a perpetuity. Jackson v. Topping, 1 Wend. 388; Plumb v. Tubbs, 41 N. Y. 442; Towle v. Remsen, 70 Id. 303; O'Brien v. Wetherell, 14 Kans. 616; Ind., etc., R. R. v. Hood, 66 Ind. 580; Horner v. Chic., etc., R. R., 38 Wisc. 165; Osgood v. Abbott, 58 Me. 73; Cong. Soc. v. Stark, 34 Vt. 243, 248; French v. Old South Soc., 106 Mass. 479; Gray Perpetuities, § 304, et seq., though apparently the rule is otherwise in England. In re Macleay, L. R.,

20 Eq. 186-90; Gray Perpetuities, §§ 299-303; Dunn v. Flood, 25 Ch. Div. 629.

Whichever of these views is regarded as sound, it seems clear that both are founded in the same conception of the common law as to conditions. The former proceeded on the ground that, because the right of entry was limited to the grantor and his heirs, it was not amenable to the rule against perpetuities, as a complete title could always be made by the grantor or his heirs and the grantee uniting in a conveyance, and thus relieve the estate of the quality of inalienability, or of the impossibility of making title, which has very generally been assigned as the ground for the rule. Harlow v. Cowdrey, 109 Mass. 183; Brattle Sq. Ch. v. Grant, 3 Gray 142, 148. The latter seems to be based on the admitted character of the right of reëntry as a chose in action personal to the grantor, though forming the ground of transfer of the title at an uncertain future day.

That such a contingent and personal relation, therefore, could not be the subject of alienation was a direct result of the common-law doctrine of privity, and for the same reasons that also restricted the enforcement of covenants, in the earlier days of the common law, at the instance of any one but the covenantee and his heirs. Year B., 20 and 21 Edw. I. 232; Oates v. Frith, Hob. 130; Co. Lit. 117 a.

And when the restrictions of privity were modified in the case of covenants, either as inhering in or touching the land, and their benefit was transferred beyond heirs to all who took the estate benefited; Middlemore v. Goodale, Cro. Car. 503, or went with the reversion of the estate conveyed; Year B., 20 Ed. I. 232-4; Fitz. Abr. Cov. pl. 28; Fitz. Nat. Brev. 145 c; or after the statute Quia Emptores had abolished tenure and reversionary rights on grants in fee, to assignees of the reversion of estates for life or years; no similar modification took place in respect to conditions, and they were rigidly held insusceptible of transfer by the act of the party thereto. Co. Lit. 214 a. "And the reason hereof is for avoiding of maintenance, suppression of right, and the stirring-up of suites; and therefore nothing in action, entrie, or reëntrie can bee granted over; for so under colour thereof pretended titles might be granted to great men, whereby right might be trodden downe and the weake oppressed, which the common law forbiddeth as men to grant before they be in possession," Ib.

A deed purporting to convey this chose in action was, however, ineffective only for that purpose. By force of the doctrine of champerty and maintenance, it operated to divest the grantor of all right of taking advantage of the condition. And this result has often since been asserted to follow, though probably without due consideration that in its origin it was in the nature of a penalty merely; Stat. 32 Hen. VIII. c. 9, Co. Litt. 369 a, 214 a; or of its consonance to modern rules of law. Warner v. Bennett, 31 Conn. 468; Hooper v. Cummings, 45 Me. 359; Underhill v. Saratoga, etc., R. R., 20 Barb. 455; Piper v. U. P. R. R., 14 Kans. 574, 582; Peaks v. Blethen, 1 Atl. Rep. 451, 454; Rice v. B. & W. R. R., 12 Allen 141. In hardly any of these cases was it directly decided except the last, where it was held that a grant by a father to a son of all his interest in a certain larger lot which included in its description a parcel previously granted thereout to the defendants, on condition that they should forever maintain a passway over their track, would defeat the condition, in the son's hands as heir to his father. The court enforced the strict rule, under the statutes of maintenance, although there were no terms in the father's deed which necessarily applied to the condition; for if the grantor had no alienable interest in the conditional parcel, his deed might have been limited to what he had a right to convey. It is true that at common law, under the statutes of champerty and maintenance, it was held that this effect attached to making a feoffment or levving a fine. Shep. To. 157, 158; quoted by the court: "... If one before the condition broken doth make an absolute feoffment, or levy a fine of all or part of the land to the feoffee or any other, by this the condition is gone and discharged forever." But the operation of a feoffment or fine by the English law was to transfer an estate, even by wrong, at least until the decision of Taylor v. Horde, 1 Burr. 60, and eminent authority has doubted if even this decision were in accordance with the strict principles of the early common law. But this transcendent effect of these forms of conveyance did not necessarily attach to the ordinary deeds in Massachusetts; for, as frequently held by the courts of that State, as indeed is generally the rule in America, these would be treated as of the character which would best effectuate the intent of the parties. Trafton v. Hawes, 102 Mass. 533; Eckman v. Eckman, 68 Penn. St. 460; Smith v. Cooper, 59 Ala.

494; Doe v. Pickett, 65 Id. 487, 491. This rigorous application of a rule derived from the now largely obsolete notion of champerty and maintenance is the more remarkable as the courts of the same State have held a right of reëntry devisable, as being not a mere chose in action, but a contingent interest in land; Austin v. Cambridgeport, 21 Pick. 215, 223; Dunlap v. Bullard, 131 Mass. 161.

It was, moreover, certainly open to question whether, in view of the many established exceptions to the ancient laws of champerty, — such as negotiable paper; and the universally admitted assignability of choses in action, except for some personal torts before judgment, Rice v. Stone, 1 Allen 566, —it was consonant to the law of to-day to enforce the penal side of the ancient statutes, and not sufficient simply to declare the incapability of the right to pass; the assertion of which incapability maintained, unless forfeited penally, the right of the grantor to reënter.

The inalienability of a condition thus declared at common law has been consistently maintained by the courts of common law, down to the present time, and only the grantor and his heirs allowed to reënter for condition broken. Williams v. Jackson, 5 Johns. 489; Nicoll v. N. Y. & E. R. R., 12 N. Y. 121; Warner v. Bennett, 31 Conn. 468, 478; Norris v. Milner, 20 Ga. 563; Piper v. U. P. R. R., 14 Kans. 574, 582; Holden v. Joy, 17 Wall 211; Henderson v. Hunter, 59 Penn. St. 335; Webster v. Cooper, 14 How. 488; Trask v. Wheeler, 7 Allen 109. And cases where any one other than the grantor or his heirs have entered or brought ejectment proceed upon special reasons, such as the frame of the action; Bear v. Whisler, 7 Watts 144; where the plaintiff was also the grantor's daughter as well as assignee; or as in Merrifield v. Cobleigh, 4 Cush. 178; where the grantee's interest in the condition, if he had any, was regarded as in the nature of easement; as a similar stipulation has since been held to be by that court; Bronson v. Coffin, 108 Mass. 175; as well as in other jurisdictions; Burbank v. Pillsbury, 48 N. H. 475. And even when, as in the courts of New York, a right of reëntry for breach of condition has been treated in some cases apparently as creating something in the nature of a reversion, and preventing a transfer of a lessee's whole term to another from operating as an assignment; Collins v. Hasbrouck, 56 N. Y. 157; Gansen v. Tifft,

71 Id. 48; Martin v. O'Conner, 43 Barb. 514; already referred to in another connection, it will be found that this doctrine has been limited to leases for years, and that the form of the instrument of transfer was a demise, Ib. See also Patten v. Deshon, 1 Gray 325; McNiel v. Kendall, 128 Mass. 245. And in no case have the courts of the former State qualified the doctrine that a condition at law is by itself inalienable, De Peyster v. Michael, 6 N. Y. 467; although in well considered cases it has been held to pass with other real rights on a lease in fee, Van Rensselaer v. Hays, 19 N. Y. 68; Same v. Dennison, 35 Id. 393; Cruger v. McLaury, 41 Id. 219.

But the law in Massachusetts, while agreeing with that of New York on the effect of reserving a condition of reëntry in a lease for years, and holding that this will prevent the transfer of the lessor's whole interest from being an assignment, does so distinctly on the ground that such reservation is of a contingent interest in the realty, Dunlap v. Bullard, 131 Mass. 161, 163: as indeed that court had already held in cases of a devise of a condition, reserved on a grant in fee, Austin v. Cambridgeport, 21 Pick. 215; Hayden v. Stoughton, 5 Pick. 528; Clapp v. Stoughton, 10 Pick. 463; Tilden v. Tilden, 13 Gray 103. It is difficult to perceive why, if the interest is devisable, it should not be assignable as well, unless a distinction were based on the fact that the last statutes of champerty, 32 Hen. 8, c. 9, though after the first statute of wills, 32 Hen. 8, c. 1, did not in terms refer to devises. The last three cases just cited might well have been sustained as cases of conditional limitation, as we shall notice further on. But this could not be done in Austin v. Cambridgeport, as the condition and devise there were in separate instruments, of different dates. Moreover, the right of the devisee to enter is put broadly on the condition being a contingent interest in realty. It is said: . . . "The interest of the testator was not a present right of entry, but a contingent possible estate. That such an interest is devisable in England seems well established by the case of Jones v. Roe, 3 T. R. 88." But the interest in the case last named was an executory devise; the distinction was there expressly drawn between a bare possibility and a possibility coupled with an interest; and executory devises were placed in the latter class and held devisable by force of the statute of wills, 34 & 35 Hen. 8, c. 5, as springing or shifting uses had

been without that statute. The language of Willes, C. J., that "executory devises are in the nature of contingent remainders," was cited with approval. The learned court of Massachusetts probably did not mean to hold that at common law conditions "were in the nature of contingent remainders." In Tilden v. Tilden, 13 Gray 103, the estate was distinctly limited over, on breach, from the testator's son to his daughter; and seemed therefore to be rather a conditional limitation than a condition. For exactly the same terms, only pointing more strongly to a condition by the added words, "revert to my estate," were held a conditional limitation in Brattle Sq. Ch. v. Grant, 3 Gray 142. But, whatever the law may be in that State, there is no question that such an exception to the inalienability of a bare condition by devise does not exist elsewhere; Avelyn v. Ward, 1 Ves. 420; Southard v. Cent. R. R., 26 N. J. 13; Ruch v. Rock Island, 97 U. S. 693, and was unknown to the common law; Shep. To., Preston Ed. 120. It was also held by the court of the same State that such a condition could not be devised after breach. But if the right to reënter is the real transmissible interest which the court consider it to be, so far from losing its transmissible quality by the grantee's breach, it was rather turned into a more immediate interest, becoming a present instead of a prospective or possible right of entry.

In Connecticut and New Jersey the rule of the common law has been abrogated by statute, permitting the benefit of a condition to be transferred by deed or will, if before breach. Conn. Gen. Stat. 1888, § 1053; Act of 1875, Hoyt v. Ketcham, 54 Conn. 60; New Jersey Act of March 12, 1851; Nixon Dig. 126, § 32, Cornelius v. Ivins, 26 N. J. 376, though before this the common-law rule fully prevailed in both States, Ib.

In England the only modification of the common law towards enabling the benefit of conditions to be transferred was by the Stat. 32 Hen. 8 c. 34, for the benefit of lessors, which has generally been adopted expressly or by implication in the United States, except in Ohio, Connecticut, and South Carolina, Taylor v. De Bus, 31 Ohio St. 468; Taylor, Land. & T., § 439, n.

This statute, however, did not extend to other leases than those for life or years, the benefit of covenants and conditions passing with a reversion only, and was also limited to leases under seal; Allcock v. Moorhouse, 9 Q. B. Div. 366; Standen v.

Chrismas, 10 Q. B. 135; and, though a transfer of the reversion for a term only would carry the condition, Wright v. Burroughs, 3 C. B. 685, 700; Co. Lit. 215 a, yet equally as at common law a parcel grant of the reversion would not; Cruger v. Mc-Laury, 41 N. Y. 219, 225; though it was otherwise where the reversion was severed by act of law, as by descent. So under this statute the assignment of the reversion would not carry a past breach, Trask v. Wheeler, 7 Allen 109, 111. That devisees are assignees within the meaning of the statute is also clear; Wheeler v. Earle, 5 Cush. 31. Where the lease was in fee, however, as there was no reversion properly so called, the benefit of a condition of reëntry for non-payment of rent was held in New York to pass with the rent reserved, as an estate in itself, whether called a rent service or a rent charge; Van Rensselaer v. Ball, 19 N. Y. 100, and in other cases under and by force of the special statutes of that State qualifying the reënactment of Quia Emptores; Van Rensselaer v. Slingerland, 26 N. Y. 580; Same v. Dennison, 35 Id. 393.

In Pennsylvania also, as the statute of *Quia Emptores* is not in force, but a rent on a lease in fee is a rent service, such a condition may well be annexed to the ground rent reserved on a grant in fee; see Wallace v. Harmstad, 44 Penn. St. 492; even though, as thought in that case, there is no tenure but only allodial ownership in that State; and may pass to an assignee of the rent. Indeed, in McKissick v. Pickle, 16 Penn. St. 140, it was held that as the statutes of maintenance were not in force there, a condition could be levied on as a real right; and the case of Hayden v. Stoughton, 5 Pick. 528, was relied upon.

At the common law, however, not only was the grantor of an estate upon condition unable to transfer his right before a reëntry upon a breach had revested him with the title, but upon the same principle he could not reserve the condition to any one but himself and his heirs, Co. Lit. 214, a.

And while, as we have seen, the similar early restriction of privity in regard to covenants was removed, so as to make these transferable, as in the nature of easements, when the right covenanted for inhered in the land corporeally in reference to other land owned by the grantor or by succession when the duty of the covenant touched the land of the covenantor, and there was any privity at the time of creation; Spencer's Case, 5 Co. 16 a; Pakenham's Case, Year B. 42 Edw. 3, 3, pl. 14;

Norcross v. James, 140 Mass. 188; the rule of the common law received no modification in regard to conditions until the introduction of conditional limitations. By these, under the law of uses, the granted estate could be limited over upon a breach of condition as upon an event; Shep. To. 121; Stearns v. Godfrey, 16 Me. 158, 160; Brattle Sq. Ch. v. Grant, 3 Gray 142, 146-8; Camp v. Cleary, 76 Va. 140; Woodward v. Walling, 31 Iowa 533, 535; and the limitation over took effect without a reëntry, Ib.; the effect being the same as upon an express proviso of cesser, Henderson v. Hunter, 59 Penn. St. 335, 341. It was subject to the rule against perpetuities, because a conveyance of a contingent interest in the fee; 3 Gray, supra; Theo. Ed. Soc. v. Atty-Gen., 135 Mass. 285; but like a condition it could not be limited to restrain alienation by the grantee of an estate in fee. Gray Rest. Alien., § 23.

Where, however, the first estate limited is for life only, a conditional limitation over on alienation by the life tenant is valid; Camp v. Cleary, 76 Va. 140; while a bare prohibition to alien such an estate has been regarded as bad; McCleary v. Ellis, 54 Iowa 311. When a gift is to be construed as upon condition, and when as a conditional limitation, does not seem always to have been kept distinct by the courts. In Tilden v. Tilden, 13 Gray 103, called a devise over of a condition subsequent, as the conditional estate and the devise over were both limited by the same instrument, there was no reason for holding it not to be a conditional limitation; and the limitation was precisely what was so held in Brattle Sq. Ch. v. Grant, 3 Gray 142; and that in Hayden v. Stoughton, supra, may well stand on the same ground, though it is there called and has always been referred to as the devise of a condition. In a recent case, Theo. Ed. Soc. v. Atty-Gen., 135 Mass. 285, on exactly the same facts, the devise over was held a conditional limitation and void as a perpetuity. In each of these cases the "condition" and the devise over were in the same instrument, though in the case in 5 Pick. not directly connected. But in Austin v. Cambridgeport, 21 Pick. 215, on the contrary, the condition was created by a deed inter vivos, and existed as a bare right before the testator's will was made.

Except by this mode there was at law no means by which the granted estate could pass on breach of condition to any one but the grantor and his heirs. The law can act only on the

title to land, and according to quality of estate technically so called. But equity, not being bound by the form of the transfer, but following the intent, can make the conveyance enure to the parties beneficially entitled. Thus in Bear v. Whisler, 7 Watts 144, not only was the remedy of ejectment operated as a bill to redeem, according to the practice there prevailing, but, being equitable, it was permitted to be brought by the person whom the grantor intended to secure by the condition; and the grantee, after judgment rendered against him, was allowed to redeem. It may be said, therefore, to be a generally received doctrine that, wherever the original conveyance creates in a party not otherwise in privity with the grantee, by a reasonable intendment from the terms of the deed, a right or interest in the granted estate, on the footing of a charge, easement, trust, restriction, or the like, it will be enforced in equity and at least recognized at law. It was, as we have seen, broadly stated in Rawson v. Uxbridge, 7 Allen 125, 129, 130, that, while merely limiting the use or purpose of a grant did not make it on condition, yet that the limitation would be enforced as a trust or covenant according to its nature and terms. Raley v. Umatilla Co., 14 Oreg. 172; Brown v. Caldwell, 23 W. Va. 187. In the leading case of Stanley v. Colt, 5 Wall. 119, on a devise to trustees of certain land "provided" that the same should not be sold, it was held that, though this word was a technical word of condition, its force was controlled by the fact that coupled with this and also under the same proviso were numerous regulations prescribed upon and governing the action of the trustees; and it was held that there was no condition, but a trust only.

In Sohier v. Trinity Ch., 109 Mass. 1, the original conveyance of the land, and a further conveyance made in pursuance thereof, were both upon the "use, confidence, and trust" for building a church and meeting the expense thereof. The trustees, in their turn conveying, did so "in trust and upon condition" that the premises were to be appropriated to use as a church. Upon a bill in equity to restrain a sale, there was held to be no condition as such, especially as its enforcement would only carry the estate back to the trustees and leave it still subject to the trust; and generally because the conveyances intended a general benefit to a class, and were not limited to the original grantor. The same rule was maintained in the elaborately considered case, Farnham v. Thompson, 34 Minn.

330, and it was there, after a full review of the authorities, held that, even though technical words of condition, such as "condition," "provided," "so as," were employed, these were not conclusive to create a condition; but the question was one of intention; and accordingly a trust and not a forfeiture was there enforced; and the case of Hunt v. Beeson, 18 Ind. 380, where a conveyance only to a certain specified use was held thereby to create a condition, was denied to be law. So in Thornton v. Trammell, 39 Ga. 202, where a grant of land for a depot was on the "express understanding and agreement that said tract is not to be occupied for any other use, etc.," this was held to create not a condition but a covenant only, to be enforceable as such. And similar rights were said to flow from like conveyances in Daniels v. Wilson, 27 Wisc. 492; Sperry v. Pond, 5 Ohio 387; Taylor v. Binford, 37 Ohio St. 262; Cong. Soc. v. Stark, 34 Vt. 243; Strong v. Doty, 32 Wisc. 381; Fuller v. Arms, 45 Vt. 400. The objection to these and to the similar restrictions or limitations of use or purpose hereafter to be considered, that they are void because in restraint of trade, has been repeatedly overruled; and it is obvious that they are not open to this objection; for, as they impose a restriction only on one parcel, for the benefit of another, and on one mode of use, for the benefit of some class or individual only and not generally, the restraint is limited both in locality and extent. Watrous v. Allen, 57 Mich. 362; Doty v. Martin, 32 Id. 462; Plumb v. Tubbs, 41 N. Y. 442; Whitney v. U. R. R., 11 Gray 359; Caswell v. Gibbs, 33 Mich. 331; Hodge v. Sloan, 107 N. Y. 244; Stines v. Dorman, 25 Ohio St. 580; Winnepesaukee Assoc. v. Gordon, 63 N. H. 505; Cowell v. Springs Co., 100 U. S. 55; O'Brien v. Wetherell, 14 Kans. 616; Webb v. Robbins, 77 Ala. 176; Beal v. Chase, 31 Mich. 490. The same equitable view prevailed in Wier v. Simmons, 55 Wisc. 637; Daly v. Wilkie, 111 Ill. 382; Gallaher v. Herbert, 117 Id. 160; Woodward v. Walling, 31 Iowa 533; and the court held that where the stipulation in the nature of a condition was for the payment of money to a third person it created a charge and not a condition.

The principle involved in these several classes of cases, including some yet to be considered, is an equitable one in its origin and generally in its direct enforcement. It proceeds substantially, if not entirely, upon the interest of the party really

beneficially entitled, and effectuates that interest by appropriate proceedings according to the character of the right; that is, either by restraint by injunction, or by specific performance if there is a covenant or trust. While, therefore, a bare prohibition on the legal incidents of the title will be rejected as repugnant to the estate conveyed, whether framed as a restriction on its use, Craig v. Wells, 11 N. Y. 315; Lyon v. Hersey, 103 Id. 264; or upon its alienation, McCleary v. Ellis, 54 Iowa 311; Shep. To. 119; or as a condition expressly depriving the grantee of such right of alienation as the grant naturally implied, Ib; Hartung v. Witte, 59 Wisc. 285; Case v. Dwire, 60 Iowa 442; by a parity of reason it will not permit the owner of property to enjoy it without the liability of its application to those entitled as creditors or otherwise; and will by proper proceedings hold them entitled to look to it for satisfaction of their claims, to the extent to which it is the property of the holder. Hence it was held in Brandon v. Robinson, 18 Ves. 429, that a devise of property to trustees for testator's son, which was not to be amenable to the debts of the devisee, there being no limitation over of it, vested the income in him without that restriction; and that his creditors could subject it to their claims. And this is substantially the law now, in England and very generally in the United States; Graves v. Dolphin, 1 Sim. 66; Pierce v. Roberts, 1 My. & K. 4; Kearsley v. Woodcock, 3 Hare 185; Tillinghast v. Bradford, 5 R. I. 205; Dick v. Pitchford, 1 Dev. & B. Eq. 480; Pace v. Pace, 73 N. C. 119; Bailie v. McWhorter, 56 Ga. 183; Warner v. Rice, 66 Md. 436; Turlev v. Massengill, 7 Lea 353; Hooberry v. Harding, 10 Id. 392; Knefler v. Shreve, 78 Ky. 297, and the income of equitable life tenants is subjected to their debts. See, however, White v. Thomas, 8 Bush 661; Davidson v. Kemper, 79 Ky. 5. The rule is otherwise in Pennsylvania, Overman's App., 88 Penn. St. 276; and apparently in the U. S. courts, Nichols v. Eaton, 91 U. S. 716; and in Massachusetts, Broadway Bk. v. Adams, 133 Mass. 170, which was a case of novel impression in that State. In Hall v. Tufts, 18 Pick. 455, a proviso against alienation by vested remainder-men before their shares were assigned to them was held void; and a proviso that devised land should not be subject to attachment or execution was also held void, Blackstone Bank v. Davis, 21 Pick. 42; though the court in 133 Mass. distinguish that case as in trust and for life only. In

Smith v. Harrington, 4 Allen 566, it was held that a class of devisees could overrule a power of selection among them by the trustees.

Restraints by condition on alienation, limited as to certain persons, have been held good. Co. Lit. 223 a; Tud. Ca. 794; and also restraints on alienation generally if limited in point of time. McWilliams v. Nisly, 2 S. & R. 507; Camp v. Clary, 76 Va. 140; Stewart v. Brady, 3 Bush 623; Gray v. Blanchard, 8 Pick. 284; Shonk v. Brown, 61 Penn. St. 320. But in the elaborately considered case of Mandelbaum v. McDonell, 29 Mich. 78, it was held that a limited restraint in point of time on alienation of a vested estate was bad, without a gift over. The court distinguish Large's Case, 2 Leon. 82; 3, 182, as a case of contingent gift, and criticise the somewhat numerous opinions to the contrary, as having overlooked this fact. But it is not clear why the limitation in Large's Case was not vested liable only to be divested, being given in the first instance nominatim to ascertained persons, Bromfield v. Crowder, 4 Bos. & P. 313; Edwards v. Hammond, 3 Lev. 132.

Besides the recognition which the courts of common law extend to restrictions or duties established and enforced by equity, they also have in certain cases, where the form has permitted it, themselves applied the benefit to the party beneficially entitled. In New York, indeed, and some other jurisdictions, the ancient restriction of privity to the party to the contract from whom the consideration moved has been largely removed, even when the instrument is under seal, Lawrence v. Fox, 20 N. Y. 268; and the doctrine has been announced broadly that a party could sue on a promise made for his benefit though not to him directly. This has in later cases been considerably modified, Garnsey v. Rogers, 47 N. Y. 233; Pardee v. Treat, 82 Id. 385; Condict v. Flower, 106 Ill. 105, and chiefly applied where, as in conveyances subject to mortgages, the promisor has received the land absolutely as the fund out of which payment is to be made. Thorp v. Keokuk Co., 48 N. Y. 253; Campbell v. Smith, 71 N. Y. 26; Crawford v. Edwards, 33 Mich. 354; George v. Andrews, 60 Md. 26; Ross v. Kennison, 38 Iowa 396. In other States, as in Connecticut, the right to sue by the beneficiary in his own name has been made to turn on the intention, Meech v. Ensign, 49 Conn. 191; while in others it has been denied altogether. Mellen r. Whipple, Gray

317; Exch. Bk. v. Rice, 107 Mass. 37; Prentice v. Brimhall, 123 Id. 291; Crowell v. St. Barn. Hosp., 27 N. J. Eq. 650; Snyder v. Summers, 1 Lea 534, 540; Nat. Bk. v. Gr. Lodge, 98 U. S. 123. But, whatever may be the rule of law on this point, yet, where the obligation is in form a covenant and in substance a transfer of an interest in land for the benefit of other land, it will enure to the use of whoever takes the latter land, and covenant will lie therefor. Burbank v. Pillsbury, 48 N. H. 475; Kellogg v. Robinson, 6 Vt. 276; Richardson v. Tobey, 121 Mass. 457; and see Bronson v. Coffin, 108 Id. 175, commenting on Parish v. Whitney, 3 Gray 516, where it was held that neither benefit nor burden ran on a stipulation in a deed poll that a fence should be maintained. The latter is sustained in later cases, Martin v. Drinan, 128 Mass. 515; Kennedy v. Owen, 136 Id. 199, on the strict ground that a grantee in a deed poll could not be liable as a covenantor. But as to this a different rule has very generally been followed. Atl. Dock Co. v. Leavitt, 54 N. Y. 35; Bowen v. Beck, 94 Id. 86; Finley v. Simpson, 22 N. J. 311.

Whatever limits may exist at common law to enforcing stipulations, contained in deeds poll, as covenants running with the land, or by an action of covenant technically, the power of courts of equity to give effect to agreements affecting one parcel for the benefit of another, substantially as easements, is clearly admitted. In the leading case of Tulk v. Moxhav, 2 Phill. 774, the grantee covenanted to keep the land granted open as a pleasure ground to which the tenants of his grantor's neighboring houses should always have access, and an injunction was prayed for to prevent the building thereon by defendant, a remote grantee for value, whose deed contained no reference to the restriction. It was contended for the defendant by Sir R. Palmer (afterwards Ld. Selborne) that, though the defendant had, in fact, notice of the restriction, yet it was, according to the rule laid down in Keppell v. Bailey, 2 My. & K. 517, an unusual burden on the land, and inconsistent with the property conveyed, and therefore that a purchaser for value was not to presume that it ran to bind him. But this contention was overruled, Ld. Chancellor Cottenham saying: "The question is not whether the covenant runs, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into with his vendor:" and Bed-

ford v. Brit. Museum, 2 My. & K. 552, before Ld. Eldon, was referred to with approval. A similar rule had been indeed already applied in Whatman v. Gibson, 9 Sim. 196, where the restriction was against using the premises for an inn, and the benefit of a reciprocal covenant to that effect was held to attach and run for and against remote grantees on both sides. In the leading case of Barrow v. Richard, 8 Paige 351, the same principle was applied and equitable relief given by injunction, where the original grantor, in conveying lots into which he had divided a larger tract, had inserted in each of the several deeds a similar restriction against certain specified obnoxious trades, and it was held that the relief would be given to and against any one to whom the lots came. So Hills v. Miller, 3 Paige 254; Watertown v. Cowan, 4 ld. 510, which proceeds on the principles of dedication; Dorr v. Harrahan, 101 Mass, 531, where the bill was brought by the original owners joining with certain of the parcel grantees. So Greene v. Creighton, 7 R. I. 1, where the agreement, though made by the several owners with a third party, operated also a binding agreement inter se. This relief, as we have seen in Tulk v. Moxhay, supra, will be extended in favor of the grantor himself. There was in that case a covenant, but the same relief will be given whatever the form of the stipulation, and though the undertaking is implied only, and the grantor will not be left as at common law to reënter for condition broken. Peck v. Conway, 119 Mass. 546. It had been held earlier, in Whitney v. Union R. R., 11 Gray 359, where the stipulation was, inter alia, that, if the premises granted were used for mechanical purposes, the grantor might enter and abate, and relief was afforded by injunction, that the form was immaterial and that the agreement would be enforced, "whether it is in the technical form of a condition or covenant, or of a reservation or exception in the deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement," p. 363. In Clark v. Martin, 49 Penn. St. 289, the grant was on an express condition against erecting a building more than ten feet high on the back of the granted premises. Grantor owned and occupied the adjoining lot, and his devisee enforced by injunction the restriction against a remote grantee of the purchaser. In Stines v. Dorman, 25 Ohio St. 580, a stipulation, in form of a condition, to the same effect as that in Whatman v. Gibson, supra, was

enforced by injunction against a purchaser of the conditioned estate.

As these cases proceeded upon the ground that the stipulation in effect amounted to an equitable easement upon the granted land in favor of the other land of the grantor, it logically followed that, while the burden ran to charge all purchasers with notice express or legally implied, the benefit and remedy therefor enured to all grantees of the latter parcel. Collins Manuf. Co. v. Marcy, 25 Conn. 242; Gibert v. Peteler, 38 N. Y. 165; Easter v. L. M. R. R., 14 Ohio St. 48, 54; Story v. N. Y. El. R. R., 90 N. Y. 122; Phænix I. Co. v. Cont. I. Co., 87 Id. 400. And further that, as these rights stood on the footing of a present equitable interest, in the realty, and not as choses in action or future contingent transfers, they were not open to objection under the rule against perpetuities; per Bigelow, J., 11 Gray 366; Tobey v. Moore, 130 Mass. 448; and in numerous instances restrictions to extend for a fixed period longer than the twenty-one years and a fraction, allowed as absolute time by that rule, have been sustained without question. In the cases already considered the restriction was connected by fair intendment from the terms of the instrument with the adjoining estate sought to be benefited by the restraint imposed, that is either with that retained by the grantor, Peck v. Conway, 119 Mass. 547, or in the ownership or possession of some third person.

The principle, however, has latterly been extended to apply equitable relief to all, even though not directly adjoining the limited estate, who take lots or parcels included originally under one ownership and divided under one general scheme of improvement, though no reference is made to such scheme or other lots in any one deed. Barrow v. Richard, 8 Paige 351. Generally this common scheme appears by similar restrictions being attached to each granted parcel of the land, and by proof aliunde of the surrounding facts. Parker v. Nightingale, 6 Allen 341; Linzee v. Mixer, 101 Mass. 512; Duncan v. R. R. Co., 4 S. W. R. 228; Schwoerer v. Boylst. Mkt., 99 Mass. 285; Sanborn v. Rice, 129 Id. 387; Keening v. Ayling, 126 Id. 404; Greene v. Creighton, 7 R. I. 1. And all are bound who take derivatively and with notice, even though the restriction is not mentioned in their own deeds. Tulk v. Moxhay, 2 Phill. 774; Whatman v. Gibson, 9 Sim. 196; Stines v. Dorman, 25 Ohio

St. 580; Duncan v. R. R. Co., 4 S. W. R. 228; Whitney v. Union R. R., 11 Gray 359; and such notice is implied from the record of the original deed containing the restriction: Peck v. Conway, 119 Mass. 547. As has already been stated, it is immaterial that the restrictions are called conditions, Parker v. Nightingale, 6 Allen 341; Skinner v. Shepard, 130 Mass. 180; Tobey v. Moore, Id. 448; Ayling v. Kramer, 133 Id. 12; for their real character is determined by their subject matter and not from the technical words employed, Ib.

Where, however, there is no such common scheme of improvement and no division of the granted land into lots is made by the original owner, no such equitable easement arises as to succeeding grantees. Thus in Jewell v. Lee, 14 Allen 145; the restriction against erecting any building was imposed in form of a condition on the whole lot when conveyed undivided, and it was held that upon a subsequent division by parcel grantees the restriction could not be availed of by one parcel grantee against another, but remained enforceable, if at all, as a condition, by the original grantor and his heirs only. And in Dana v. Wentworth, 111 Mass. 291, where also there was no common scheme in a grant on condition, the grantor was not allowed to proceed in equity for the benefit of one grantee, but left to the condition at law. But see Winfield v. Henning, 21 N. J. Eq. 188 contra. But it also seems to follow that, if the stipulation once receives the character of a restriction for and against the grantees, the grantor, having parted with all the land for whose benefit it was created, will not be allowed in equity, or possibly at law, to treat it as a condition. No one but a neighbor or abutter is within the equitable benefit, Renals v. Cowlishaw, 9 Ch. Div. 125; 11, 366. And when, as in Sharp v. Ropes, 110 Mass. 381; Badger v. Boardman, 16 Grav 559; Hubbell v. Warren, 8 Allen 173, 178; Skinner v. Shepard, 130 Mass. 180; and other cases, where, whether there was a division into lots by the grantor or not, there was no common scheme but only independent grants, some containing the restriction and others not, the restriction, being imposed for the grantor's benefit only, would not be enforceable by the grantees inter se. In Schreiber v. Creed, 10 Sim. 9, an indenture was made between an owner who laid out his land in lots on a general scheme of improvement, according to a plan which was annexed thereto, and certain other parties who then bought of him. It was held that this did not enable one who subsequently bought several lots from him subject to the restrictions, as described on the plan, to enforce those restrictions against the owner, upon the owner's subsequent modification of some of them under a power reserved in the indenture, though this purchaser had himself conformed thereto. On similar principles it was held in Duncan v. R. R. Co., 4 S. W. R. 228, that a waiver by the original grantor of the restrictions as to some of the parcels waived it as to all; and in Beals v. Case, 138 Mass. 138, that one who bought under such a general scheme could not enforce a restriction existing apparently when he bought against one who bought later from the same grantor but as to whom it was waived.

As the right to enforce a restriction made in form of a condition has thus become, as to the lands benefited, an easement and no longer a condition, it seems to result that the original grantor, retaining no longer any interest, cannot take advantage of the clause of forfeiture upon a breach. Indeed, the position is broadly taken in Mitchell v. Leavitt, 30 Conn. 587, that all conditions not for the benefit of some individual or of the public are void. So, per Lowrie, C. J., Clark v. Martin, 49 Penn. St. 289, 297. In Barrie v. Smith, 47 Mich. 130, also, where there was a condition of reverter if intoxicating liquors were sold on the premises, it is very elaborately considered whether any condition could be validly imposed and operative as such, restraining the use of the premises granted, when the grantor had no interest or property affected by the prohibited uses. This question is indeed settled in Michigan by statute to that effect; 2 Comp. Laws § 4113 (the statutes of Wisconsin are to the same effect; Rev. Stat. c. 43 § 86); but the court treat this apparently as declaratory only. It is there said, "A more serious question, however, remains to be considered. May an owner of lands, when conveying the same, insert such conditions subsequent as his fancy may dictate and upon a breach thereof insist upon a forfeiture of the estate, although such breach in no way tends to his prejudice? . . . Upon what principle could such conditions be enforced other than that as mere owner he had a right to insert any conditions which the grantee would accept? If this right exists, then conditions in restraint of trade, and that would tend to prevent alienation of the property, may be inserted at pleasure, and the courts be

called upon to enforce the same. The right to insert conditions like the one in this case [against the sale of intoxicating liquors] we do not question where it appears that the grantor had a special interest in the enforcement thereof. An owner of real estate may, when conveying a part thereof, undoubtedly impose conditions which, if reasonable, courts would by an appropriate remedy restrain and prevent the violation thereof for the protection of the grantor and his privies in estate certainly so long as the reasons which gave rise to the condition still existed. . . . A party owning two adjoining lots or a tract of land may, when selling one or a part of the tract, be interested in preventing any noxious business from being carried on thereon, or in having it improved in a certain manner. The reason in such cases would be apparent, and so long as it existed should be ground for enforcing the condition. When, however, the grantor has parted with all his interest in the remaining property, while his subsequent grantees may be interested in and have a right to insist on such a condition, it may be very questionable whether he has any such right or interest."

But, whether this sensible view of the law of conditions can as yet be said to prevail or not, it seems clear that the original grantor cannot avail himself of a condition intended at its creation for his other land, after he has parted with such land: for the right created can hardly be at once a condition in his hands and an actually vested though equitable easement in those of his grantees. Jewell v. Lee, 14 Allen 145; Dana v. Wentworth, 111 Mass. 291. It was indeed held in Reed v. Stouffer, 56 Md. 236, and Univ. Soc. v. Dugan, 65 Id. 460, already referred to, that the grantor's heirs could reënter for the appropriation of the granted premises to a different use from that specially limited, namely a burial-place. But as the conveyances created a trust - as is expressly held - it would seem that, no breach having been committed by the cestui que trust, the grantor's heirs would upon such entry hold the land still charged with a trust which their entry was inoperative to defeat.

In Gibert v. Peteler, 38 N. Y. 165, also, it was declared that where a purchaser for value took the deed in the name of another, who in turn conveyed, inserting a restriction for the benefit of the former's estate in the form of a condition,

this not only imposed an equitable easement enuring to the former, but could be operated as a condition by the latter grantor. The point actually decided was merely that this prevented the last purchaser from giving a clear title, the validity of the restriction being alone in issue, and the attention of the court was not drawn to the incongruity of the same right existing as an easement in one and a condition in another; nor the inconsistency of giving to the same words in the same instrument two distinct meanings, from which conflicting rights were derived. And the consequence seems to have been overlooked that a reëntry by the grantor would necessarily defeat the easement, as an intermediate right, created after his former estate; and in its nature a legal interest; Greene v. Creighton, 7 R. I. 1. For he could hardly be held as a trustee, where he had not originally declared a trust, merely by reason of an engagement entered into by his grantee. The cases of Stuyvesant v. Davis, 9 Paige 427, and Linden v. Hepburn, 3 Sandf. 668, seem therefore in point; and see Conger v. Duryee, 90 N. Y. 594, 599, to the same effect.

It is a well settled principle that equity will not enforce a penalty or decree a forfeiture. Watrous v. Allen, 57 Mich. 362; Warner v. Bennett, 31 Conn. 468; Birmingham v. Lesan, 77 Me. 494; Livingston v. Stickles, 8 Paige 398; Livingston v. Tompkins, 4 John. Ch. 415; Baxter v. Lansing, 7 Paige 350; Marshalltown v. Forney, 61 Iowa 578. And this proceeds not so much on the ground that the entry for condition broken is adequate at law; but on the general policy of equity; Marble Co. v. Ripley, 10 Wall. 339; Watrous v. Allen, supra; as a forfeiture is not a rescission, leaving the parties in statu quo. Stringer v. Keokuk, etc., R. R., 59 Iowa 277; Gardner v. Lightfoot, 71 Id. 577. Hence, while the grantor upon condition, or his heirs, may in certain cases have recourse to equity, this is not by way of forfeiture but only to restrain the intended breach. Smith v. Jewett, 40 N. H. 530.

But this is limited to the effect of conditions as such; for where there is a covenant to reconvey, equity will decree performance. Robinson v. Robinson, 9 Gray 447; Hubbard v. Hubbard, 97 Mass. 188; and see Blake v. Blake, 56 Wisc. 392. So, while equity will not decree a forfeiture for non-performance of a condition to support, yet, when entry has been made, equity will remove the grantee's claim, as a cloud upon

grantor's title. Birmingham v. Lesan, 77 Me. 494. So where compensation can be decreed instead of forfeiture, equity will entertain a bill by the party holding the condition. Stevens v. Pillsbury, 57 Vt. 205. Nor is equity deprived of its jurisdiction to restrain a breach of covenant though a right of rëentry is also reserved. Godfrey v. Black (Kans.), 17 Pac. Rep. 849; Stees v. Kranz, 32 Minn. 313.

In some cases, however, equitable relief has been denied to a grantor on condition on the ground that he must look to his condition only. Blanchard v. Detroit, etc., R.R., 31 Mich. 50; Marble Co. v. Ripley, 10 Wall. 339; Woodruff v. Water P. Co., 10 N. J. Eq. 489. It seems difficult to sustain the last of these cases on any ground. It is doubtful if there was there any condition at all. There were no apt words of condition, and the grantee's stipulations, which were covenants or limitations of the use or purpose, were numerous, and it could hardly be held that a breach of any one of them singly would defeat the grant. See p. 666. Furthermore, being in some measure at least for the benefit of other property of the grantor, they might have been treated as capable of equitable enforcement as covenants or restrictions. Stees v. Kranz: Godfrey v. Black, supra. The court, however, assuming that there was a condition, declare that the grantor was limited to his legal remedy of reëntry, which they say he, by the terms of his grant, had exclusively selected. A somewhat similar ground is taken in the Michigan case, but there were there strict words of condition, and the court seem to think their equitable powers thereby cut off, as they could not decree a forfeiture. In the case in 10 Wall. 339, the court regarded the right of reëntry as rather a better remedy, after all. than a decree of repossession; for, as the condition was to compel the production of a certain quantity of ore, the grantor, by taking possession, could secure and regulate performance. It is overlooked that a reëntry not under control of the court might not protect the grantee's rights as well as equity could; and the vagueness or indefiniteness of the duty which the court in both cases dwell upon as a bar to specific performance was hardly a ground for ousting equity, as it is not apparent what standard was to determine that there was a forfeiture for non-performance which would not avail equally as a measure for specific performance.

The main ground urged in Blanchard v. Detroit, etc., R. R., supra, was, however, that equity was debarred to act because there was a bare condition only, and no words of promise by the grantee. But, however, the strict rule that a deed poll creates no covenant by the grantee, to be enforced by an action of covenant and capable of running at common law with the land conveyed, to bind remote grantees, may obtain at law. Maule v. Weaver, 7 Penn. St. 329; Irish v. Johnston, 11 Id. 483; Cole v. Hughes, 54 N. Y. 444; Kennedy v. Owen, 136 Mass. 199; Parish v. Whitney, 3 Gray 516, though see Burbank v. Pillsbury, 48 N. H. 475; Bronson v. Coffin, 108 Mass. 175; equity is not so limited. Atl. Dock Co. v. Leavitt, 54 N. Y. 35; Bowen v. Peck, 94 Id. 86; Clark v. Martin, 49 Penn. St. 289; Finley v. Simpson, 22 N. J. 311; and even at law, acceptance of an instrument signed only by the grantor or lessor will sustain an appropriate action against the grantee or lessee. Clark v. Gordon, 121 Mass. 330; Carroll v. St. John's Soc., 125 Id. 565. The ground taken by the court of Michigan seems, therefore, rather to rest upon the technical strictness of the former law than to be in consonance with or sustainable by the equitable principles now prevailing.

SPENCER'S CASE.

PASCH. 25 ELIZ. -IN THE KING'S BENCH.

[REPORTED 5 COKE, 16.]

Covenants. — What covenants run with the land.

SPENCER and his wife brought an action of covenant against Clark, assignee to J., assignee to S., and the case was such (a): Spencer and his wife by deed indented demised a house and certain land (in the right of his wife) to S. for a term of twenty-one years, by which indenture S. covenanted for him, his executors and administrators, with the plaintiffs, that he. his executors, administrators, or assigns, would build a brick wall upon that part of the land demised, etc. S. assigned over his term to J., and J. to the defendant; and for not building of the brick wall the plaintiff brought the action of covenant against the defendant as assignee: and after many arguments at the bar, the case was excellently argued and debated by the justices at the bench: and in this case these points were unanimously resolved by Sir Christopher Wray, Chief Justice, Sir Thomas Gawdy, and the whole court. And many differences taken and agreed concerning express covenants, and covenants in law, and which of them would run with the land, and which of them are collateral, and do not go with the land (b), and where the assignee shall be bound without naming him, and where not; and where he shall not be bound, although he be expressly named, and where not.

1. When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is

⁽a) 2 Bulstr. 281, 282; Comberb. 64; (b) Moor, 159. Carth. 178; Skinner, 211, 297; 3 Wilson, 27; Cro. Jac. 439.

quodammodo annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee (a), although he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is quodammodo annexed appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant: but in the case at bar the covenant concerns a thing which was not in esse at the time of the demise made (b), but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being.

2. It was resolved that in this case, if the lessee had covenanted for him and his (c) assigns, that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, that it should bind the assignee: for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. So on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a (d) Warrantia Chartæ, F. N. B., 135 & 9 E. 2, Garr' de Charters, 30; 36 E. 3, Garr'1; 4 H. 8: Dyer, 1. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that

⁽a) Moor, 27, 399; Cro. El. 457, 552, 553; 1 Roll. 521, 522; 1 Sand. 239; Cr. Jac. 125; Cr. Car. 222, 523; 1 Jones, 245; 1 Siderf. 157; 1 Anders. 82; 1 Show. 284; 4 Mod. 80; 3 Lev. 326; Salk. 185, 317.

⁽b) Cr. El. 457; Cr. Jac. 439; Dyer, 14, pl. 69; 1 Anders. 82; Moor, 159.

⁽c) Cr. Car. 25, 188; 1 Jones, 223; 1 Roll. Rep. 360; Moor, 159, 399.

⁽d) F. N. B. 135.

was demised, or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger.

- 3. It was resolved, if a man leases (a) sheep or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them; and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract, and wants such (b) privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. But in the case of a lease of personal goods there is not any privity, nor any reversion (c), but merely a thing in action in the personalty, which cannot bind any but the covenantor (d), his executors or administrators, who represent him. The same law, if a man demise a house and land for years, with a stock or sum of money, rendering rent (e), and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant; for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum (f), but out of the land only; and therefore as to the stock or sum the covenant is personal, and shall bind the covenantor, his executors and administrators, and not his assignee. And it is not certain that the stock or sum will come to the assignee's hands, for it may be wasted, or otherwise consumed or destroyed by the lessee, and therefore the law cannot determine, at the time of the lease made, that such covenant shall bind the assignee.
- 4. It was resolved, that if a man makes a feoffment by this word (g) dedi, which implies a warranty, the assignee of the feoffee shall not vouch; but if a man makes a lease for years by this word concessi (h) or demisi, which implies a covenant.

⁽ α) 2 Jones, 152; 1 Leon. 43; Swinb. 324.

⁽b) Cr. Car. 188.

⁽c) 1 Leon. 43.

⁽d) Swinb. 324.

⁽e) See Dean, etc., of Windsor v. Gover, 2 Wms. Saund. 301; Gardiner v. Williamson, 2 B. & Ad. 336; Lord

Mountjoy's Case, 5 Co. 4; Jewell's Case, ib. 3.

 $[\]begin{array}{c} (f) \ \, \text{Kelw.} \, 153 \, \text{b.}; 1 \, \text{And.} \, 4; \, \text{Dyer}, 56, \\ \text{pl.} \, 15. \, 16.; \, 212 \, \text{pl.} \, 37. \, 38; \, 21 \, \text{E.} \, \, 4. \, 29. \, a; \\ 3 \, \text{Bulst.} \, \, 291; \, 9 \, \text{E.} \, \, 4. \, \text{l.} \, \, \text{b.} \end{array}$

⁽g) 2 Inst. 275; 4 Co. 81. a; 1 Co. 2 b; Co. Lit. 384 a; Yelv. 139; Perk. Sect. 124.

⁽h) [8 & 9 Vict. c. 106, s. 4.]; 4 Co.

if the assignee of the lessee be evicted, he shall have a writ of covenant: for the lessee and his assignee hath the yearly profits of the land, which shall grow by his labor and industry, for an annual rent; and therefore it is reasonable, when he hath applied his labor, and employed his cost upon the land, and be evicted (whereby he loses all), that he shall take such benefit of the demise and grant as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee hath bound him to.

- 5. Tenant by the courtesy, or any other who comes in in the post, shall not vouch (which is in lieu of an action). But if (a) a warrant be granted by deed to a woman who takes husband, and the woman dies, the husband shall vouch by force of this word grant, although he comes to it by act in law. if a man demises or grants land to a woman for years, and the lessor covenants with the lessee to repair the houses during the term, the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law on these words (demise or grant) as on the express covenant. The same law is of tenant by statute-merchant or statute-staple or elegit of a term, and he to whom a lease for years is sold by force of any execution shall have an action of covenant in such case as a thing annexed to the land, although they come to the term by act in law, as if a man grants to lessee for years, that he shall have so many (b) estovers as will serve to repair his house, or as he shall burn in his house, or the like, during the term, it is as appurtenant to the land, and shall go with it as a thing appurtenant, into whose hands soever it shall come.
- 6. If lessee for years covenants to repair the houses during the term (e), it shall bind all others as a thing which is appurtenant, and goeth with the land, in whose hands soever the term shall come, as well those who come to it by act in law as by the act of the party, for all is one having regard to the lessor. And if the law should not be such, great prejudice might accrue to him; and reason requires that they who shall take benefit of such covenant when the lessor makes it with the

^{81.} a; Yelv. 139; Co. Lit. 384, a; Perk. Sect. 124; Dall. 101; Cr. Jac. 73; 2 Inst. 276; F. N. B. 134. h; Hob. 12; 1 Vent. 44; Rol. 521.

⁽a) 2 Roll. 743.

⁽b) 5 Co. 24. b.; F. N. B. 181. n.

⁽c) 5 Co. 16. a. b.; 5 Co. 24 b; Cr. Jac. 240, 309, 439; 1 Jones, 223; Cr. El. 373; 1 Sid. 157; 2 Vern. 275; 1 B. & B. 238.

lessee, should, on the other side, be bound by the like covenant when the lessee makes it with the lessor.

7. It was resolved that the assignee (a) of the assignee should have an action of covenant. So of the executors of the assignee of the assignee; so of the assignee of the executors or administrators of every assignee, for all are comprised within this word (assignees), for the same right which was in the testator, or intestate, shall go to his executors or administrators (b), as if a man makes a warranty to one, his heirs and assigns, the assignee (c) of the assignee shall vouch, and so shall the heirs of the assignee; the same law of the assignee of the heirs of the feoffee, and of every assignee. So every one of them shall have a writ of Warrantia Chartæ. Vide 14 E. 3, Garr. 33; 38 E. 3, 21; 36 E. 3, Garr. 1; 13 E. 1, Garr. 93; 19 E. 2, Garr. 85, &c. For the same right, which was in the ancestor, shall descend to the heir in such case without express words of the heirs of the assignees.

Observe, reader, your old books, for they are the fountains out of which these resolutions issue; but perhaps by these differences the fountains themselves will be made more clear and profitable to those who will make use of them. For example (d), in 42 E. 3, 3, the case is: grandfather, father, and two sons. The grandfather was seized of the manor of D., whereof a chapel was parcel; a prior, with the assent of his covent, by deed covenanted for him and his successors, with the grandfather and his heirs, that he and his covent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor and his servants, &c. The grandfather did enfeoff one of the manor in fee, who gave it to the younger son and his wife in tail; and it was adjudged that the tenants in tail as (e) terretenants (for the elder brother was heir) should have an action of covenant against the prior, for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor, as it is there said. And Finchden related that he had seen it adjudged, that two (f) coparceners made partition of land, and one did covenant

⁽a) 1 Roll. 521; 1 Roll. Rep. 81, 82; 2 Bulst. 281; Owen, 151, 152.

⁽b) See Sleap v. Newman, 12 C. B.N. S. 116.

⁽c) Cr. El. 534; Co. Lit. 384. b.

⁽d) Co. Lit. 384. a; 1 Roll. 520,

^{521;} Br. Covenant 5, Statham, Covenant 3.

⁽e) Co. Lit. 385, a; 8 Co. 145, a.

⁽f) 1 Roll. 521; Co. Lit. 384. b. 385. a; 42 E. 3. 3. b; Br. Covenant 5; 1

Roll. Rep. 81.

with the other to acquit him of suit, which was due, and that coparcener to whom the covenant was made did alien, and the suit was arrear; and the feoffee brought a writ of covenant against the coparcener to acquit him of the suit; and the writ was maintainable notwithstanding he was a stranger to the covenant, because the acquittal fell upon the land; but if such covenant were made to say divine service in the (a) chapel of another, there the assignee shall not have an action of covenant, for the covenant in such case cannot be annexed to the chapel, because the chapel doth not belong to the covenantee, as it is adjudged in (b) 2 H. 4, 6, b. But there it is agreed that if the covenant had been with the lord of the manor of D. and his heirs, lords of the manor of D., and inhabitants therein, the covenant shall be annexed to the manor, and there the terretenant shall have the action of covenant without privity of blood. Vide 20 E. 3, 48, and 30 E. 3, 14. Simpkin (e) Simeon's case, where the case was, that Lady Bardolf by deed granted a ward to a woman who married Simpkin Simeon, against whom the Queen brought a writ of right of ward, and they vouched the Lady Bardolf, and afterwards the wife died, by which the chattel (d) real survived to the husband (and resolved that the writ should not abate), the vouchee appeared, and said, what have you to bind me to warranty? The husband showed how that the lady granted to his wife, before marriage, the said ward; the vouchee demanded judgment for two causes.

- 1. Because no word of warranty was in the deed; as to that it was adjudged that this word (e) (grant) in this case of grant of a ward (being a chattel real) did import in itself a warranty.
- 2. Because the husband was not assignee to the wife, nor privy. As to that it was adjudged that he should vouch, for this warranty implied in this word (grant) is in case of a chattel real so annexed to the land, that the husband who comes to it by act in law, and not as assignee, should take benefit of it. But it was resolved by Wray, Chief Justice, and the whole

⁽a) 1 Roll. 521.

⁽b) Co. Lit. 385. a; Fitz. Covenant 13; Br. Covenant 17; F. N. B. 181. n.

⁽c) Co. Lit. 384. a; 2 Roll. 743, 744;

³ Bulst. 165; Hob. 47; 1 Roll. Rep. 81; Cr. El. 436.

⁽d) 1 Roll, 345; Co. Lit. 351. a.

⁽e) Co. Lit. 384. a. 101. b.

court, that this word (concessi or demisi), in case of (a) free-hold or inheritance, doth not import any warranty; 11 H. 6, 45, acc. Vide 6 H. 4; 12 H. 4, 5; 1 H. 5, 2; 25 H. 8; Covenant Br. 32; 28 H. 8; Dyer, 28; 48 E. 3, 22; F. N. B. 145 C. 146 & 181; 9 Eliz., Dyer, 257; 26 H. 8, 3; 5 H. 7, 18; 32 H. 6, 32; 22 H. 6, 51; 18 H. 3; Covenant, 30; Old N. B. Covenant, 46 H. 3, 4; 38 E. 3, 24. See the statute of (b) 32 H. 8, cap. 34; which act was resolved to extend to covenants which touch or concern the thing demised and not to collateral covenants.

This is the leading case referred to upon every question whether a particular covenant does or does not run with particular lands, or a particular reversion.

A covenant is said to run with land, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. A covenant is said to run with the reversion, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion.

Questions upon this branch of the law generally arise between the lessor of lands or his assignee, and the lessee thereof or his assignee; and we will, therefore, briefly consider the subject with reference to persons holding those characters before enquiring into it with reference to persons not occupying those relations to each other.

Covenants between Lessor and Lessee.

An opinion has sometimes been intimated, that there were, even at common law, some covenants which ran with the reversion. The authorities, however, seem to preponderate in favor of the doctrine of Sergeant Williams, who, in Thursby v. Plant, 1 Wms. Saund. 300, n. 10, says that "the better opinion seems to be, that the assignee of the reversion could not bring an action of covenant at common law." And the cases will be best reconciled, and the whole subject rendered far more intelligible, if we adopt the view taken by the learned and eminent personages who have since edited that work (vol. 1, 240, a., note (o)), viz., "that at common law covenants ran with the land, but not with the reversion. Therefore, the assignee of the lessee was held to be liable in covenant and to be entitled to bring covenant, but the assignee of the lessor was not." [See Butler v. Archer, 12 Irish C. L. 104, Judgment of Lefroy, C.J.]

Such being the state of the common law, st. H. 8, cap. 34, after reciting among other things, "that by the common law, no stranger to any covenant could take advantage thereof, but only such as were parties or privies thereunto," proceeded to enact "that all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king of any lands or other hereditaments, or of any reversion in the same, which belonged to any of the monasteries, &c., dissolved, or by any other means come to the king's hands, since the 4th day of February, 1535, or which at any time before the passing of

⁽a) Co. Lit. 384, a.

⁽b) 32 H. 8, c. 34; Moor, 159; Cr. Jac. 523; 2 Bulst. 281, 282, 283; 1 Sand.

^{238, 239;} Co. Lit. 215. a; Cr. Car. 25, 222; 1 Anders. 82; 2 Jones 152; Owen 152; Style 316, 317.

this act belonged to any other person, and after came to the hands of the king, and all other persons being grantees or assignees to or by the king, or to or by any other persons than the king, and their heirs, executors, successors, and assigns, shall have like advantages against the lessees, their executors, administrators, and assigns, by entry, for non-payment of the rent, or for doing waste or other forfeiture, and by action only, for not performing other conditions, covenants, or agreements, expressed in the indentures of leases and grants against the said lessees and grantees, their executors, administrators, and assignees, as the said lessors and grantors, their heirs, or successors, might have had." [The assignee may therefore bring ejectment for breach of covenant to repair without giving notice of the assignment, Scaltock v. Harston, 1 C. P. D. 106; 45 L. J. C. P. 125.]

Section 2 enacted, "that all lessees and grantees of lands, or other hereditaments, for terms of years, life or lives, their executors, administrators, or assigns, shall have like action and remedy against all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, or of any other persons of the reversion of the said land and hereditaments so letten, or any parcel thereof, for any condition or covenant expressed in the indentures of their leases, as the same lessees might have had against the said lessors and grantors, their heirs and successors."

[The Conveyancing Act. 1881 (44 & 45 Vict. c. 41, ss. 10 & 11), contains some important provisions on this subject, the effect of which will be considered *infra*.]

Leases not under seal are not within the meaning of st. 32 H. 8, cap. 34, Brydges v. Lewis, 3 Q. B. 603; Standen v. Chrismas, 10 Q. B. 135 [Elliot v. Johnson. L. R. 2 Q. B. 120; 36 L. J. Q. B. 34]. And the remedy upon the stipulations contained in them is by action in the name of the original stipulator, Bickford v. Parsons, 5 C. B. 921; 17 L. J. 192. [Where, however, in the case of parol tenancies, after assignment there has been an acceptance of rent or other act affirming the tenancy, "a conventional law is thus made equivalent to that of H. 8 in the case of leases under seal," and a jury may infer that the parties have consented to go on upon the terms of the original lease. See per Willes, J., Cornish v. Stubbs, L. R. 5 C. P. 334; 39 L. J. C. P. 202; Smith v. Egginton, L. R. 9 C. P. 145. Compare Mansel v. Norton, 22 Ch. D. 769; 52 L. J. Ch. 357.]

Although the words of this act are very general, and, taken literally, would comprehend every covenant expressed in the lease; yet it is settled, as we are informed in the principal case ad finem, that it extends only to covenants which touch and concern the thing demised, and not to collateral covenants. See also Webb v. Russell, 3 T. R. 402; 1 Inst. 215 b.; Shepp. Touch. 176.

It is also settled that an assignee of part of the reversion, e. g. for years, is an assignee within the meaning of the act, 1 Inst. 215, a.; Kidwelly v. Brand, Plowd. 72; Baxter v. Hemmings, 2 Bulstrode, 281 [per Coke, C.J., citing Leonard's Case]; Wright v. Burroughs, 4 Dowl. & L. 438; 3 C. B. 684, S.C.; and so also is the assignee of the reversion in part of the land, as far as covenants are concerned, Twynam v. Pickard, 2 B. & Ald. 105; Simpson v. Clayton, 4 Bing. N. C. 758, 780; 6 Scott, 469, S. C.; though [prior to 22 & 23 Vict. c. 35, s. 3, and 44 & 45 Vict. c. 41, s. 12 (the Conveyancing Act, 1881)] he [was] not so for the purpose of availing himself of conditions, for they cannot be apportioned by the act of the party. See [infra and] Dumpor's Case, ante, and the notes thereto; and see Doe d. B. de Rutzen v. Lewis, 5 A. & E. 277. [The original reversioner, after he has assigned the reversion in part of the land, may maintain covenant, Mayor of Swansea v. Thomas, 10 Q. B. D. 48; 52 L. J. Q. B. 340.]

The assignee of the term in part of the land is within the statute, Palmer v. Edwards, Doug. 121; Twynam v. Pickard, the judgments, 2 Wms. Saund. 181, d. so is the assignee of the reversion into which a share of the term has merged, Buddeley v. Vigurs, 4 E. & B. 71; and the assignee of some of the joint tenants of a term where the covenant is joint and several, Norval v. Pascoe, 34 L. J. Ch. 82]. A grantee of the reversion in copyhold lands is also an assignee within the meaning of the statute, Glover v. Cope, 3 Lev. 326; Skinner, 305, S. C.; Whitton v. Peacock, 3 Myl. & K. 325; and where lands were devised to A. for life, remainder to B. for life, with power to A. to make leases, and A. made a lease to C. and died during the term demised, it was held that B. should sue upon the covenants: Isherwood v. Oldknow, 3 M. & S. 382. (See, too. Rogers v. Humphreys, 4 A. & E. 299.) "The question," said Le Blanc, J., [in the former case] "is - Is the plaintiff an assignee? He is the person next in remainder to the person granting the lease; true, he is not assignee of the lessor: he is assignee of the devisor. But I take it to be clear that the lease must be considered as emanating from the person who creates the power, and that it derives its force and authority from him. . . . The argument is that he cannot have this action because he must be assigneee of the person of the lessor or grantor. But he is the assignee of the person who, in the eye of the law, is the lessor: because the person empowering the tenant for life to grant the lease is, in the eye of the law, the lessor. The doctrine of Lord Coke in Whitlock's Case [8 Rep. 70] entitles the court to say upon principle that this plaintiff was the assignee of him who, in contemplation of law, was the lessor, and that as such he is entitled to this action." [See also Greenaway v. Hart, 14 C. B. 340. A railway company taking lands from a lessee under compulsion of law is not "an assign" for whose acts a lessee, who has covenanted for himself and his assigns, can be made responsible, Bailey v. De Crespigny, L. R. 4 Q. B. 180; 38 L. J. Q. B. 100.]

It seems, that a tenant from year to year, who demises by indenture for a term of years however long, has by reason of the possibility of his estate continuing longer than the demised term, a reversion with which the benefit of the covenants in the indenture may pass to an assignee during the existence of the tenancy from year to year, Oxley v. James, 13 M. & W. 209.

Both the benefit and burden of covenants, therefore, [after st. 32 H. 8, cap. 34, ran] with the reversion from assignee to assignee, in the same manner that they ran at common law from assignee to assignee, of the land. In order, however, that the covenants might continue available for the benefit of the reversioner, it was held to be absolutely necessary that he should continue to be seized or possessed of the same reversion to which the covenants were incident; for, if it happened to be merged by his becoming the owner of some other reversion in the same land, the covenants were altogether gone. Thus in Moore, 94, a person made a lease for 100 years, the lessee made an under-lease for 20 years, rendering rent, with a clause of reëntry; afterwards, the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term. It was held the grantee should not have either the rent or the power of reëntry, for the reversion of the term to which they were incident was extinguished in the reversion in fee; see also Webb v. Russell, 3 T. R. 402; Wootton v. Steffenoni, 12 M. & W. 132, where Parke, B., puts the question - If tenants in common demise their undivided interests, and there is a joint covenant with both, will that run with the reversion? [The answer to which was, that it would, but with the entire reversion only, Thompson v. Hakewill, 19 C. B. N. S. 713; 35 L. J. C. P. 18.]

One of the consequences of the above doctrine was, that when lands were

leased with a stipulation for renewal, and the lessee accepted a new lease, his remedies for rent and on the covenants contained in any under-lease he might have made were completely gone, since the reversion was destroyed to which they were incident. To obviate these evils, st. 4, G. 2, c. 28, s. 6, enacted, that in case any lease shall be surrendered in order to be renewed, the new lease shall be as valid, to all intents, as if the under-lease had been likewise surrendered before the taking of the new lease; and that the remedies of the lessees against their under-tenants shall remain unaltered, and the chief landlord shall have the same remedy by distress and entry for the rents and duties reserved in the new lease, so far as the same exceed not the rents and duties reserved in the former lease, as he would have had in case such former lease had been still continued. See on the construction of this latter provision, Doe d. Palk v. Marchetti, 1 B. & Ad. 715. Note that in Aleyn, 39, it is said that a covenant is not a duty. The loss of the reversion by merger has now, however, in certain cases, ceased to operate as an extinguishment of the rent and covenants, st. 8 & 9 Vict. c. 106, s. 9, having enacted "that when the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditaments, of any tenure, shall, after the first day of October, 1845, be surrendered or merged, the estate which shall for the time being confer as against the tenant under the same lease, the next vested right to the same tenements or hereditaments shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease." See the previous act, now repealed, 7 & 8 Vict. c. 76, s. 12. [As to when the Courts of Chancery will regard a lease as still subsisting notwithstanding legal merger of it, see Brandon v. Brandon, 31 L. J. Ch. 47, and now by "The Supreme Court of Judicature Act, 1873" (36 & 37 Vict. c. 66), s. 25, sub-s. 4, "There shall not after the commencement of this act be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity."

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), contains the following enactments relating to the matters above discussed.

Sect. 10 (1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of reëntry and other condition therein contained, shall be annexed and incident to, and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

Sec. 11 (1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to, and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

Sec. 12 (1.) Notwithstanding the severance by conveyance, surrender, or

otherwise, of the reversionary estate in any land comprised in a lease, and not-withstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of reëntry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

These sections do not seem to alter the previous law so far as the running of covenants with the reversion is concerned. Section 10 apparently enables the beneficial owner for the time being of the whole or part of the land leased to sue upon the covenants, whether he be the owner of the legal reversion or not, and whether or not there be any reversion by estoppel. This provision would enable the donce of a power of leasing having himself no legal estate to sue upon the covenants in a lease made under the power, and referring thereto, provided he were the person entitled to the income which he could not, apart from estoppel, have done under the former law. See Yellowly v. Gower, 11 Ex. 274, at p. 291.

The concluding words of s. 11, imposing the obligation of the covenant on the person from time to time entitled to the reversionary estate, if and as far as the lessor has power to bind him, seem to be merely a restatement of the law as previously settled. See *Isherwood v. Oldknow*, 3 M. & S. 382; *Greenaway v. Hart*, 14 C. B. 340; and *Yellowly v. Gower*, supra; and see Davidson's Prec. vol. 2, part 2, p. 336.

The provisions as to apportionment of conditions have made a considerable alteration in the law. As we have already seen, the assignee of a part of the reversion in the whole of the land could take advantage both of covenants and conditions, but an assignee of the reversion in part the lands, though an assignee as to covenants, was not so as to conditions. The law on this point was modified by 22 & 23 Vict. c. 35, s. 3, which enacted that, where the reversion on a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion should have, in respect of his portion of the rent or reservation, the benefit of all conditions of reëntry for non-payment in like manner as if the condition had been reserved to him as incident to his part of the reversion in respect of the apportioned rent so allotted to him.

The only condition dealt with by the above enactment was that of reëntry for non-payment of rent, and it was only applicable where the rent was legally apportioned, *i. e.* by consent or by the verdict of a jury. The sections, however, under discussion apportion all conditions which previously would have run with the unsevered reversion. They must, of course, be limited to such conditions as are applicable to the severed parts.

Section 58, which provides that covenants relating to land of inheritance are to be deemed to be made with the covenantee, his heirs and assigns, as though they were expressed, and that those relating to land not of inheritance are to be deemed to be made with the corenantee and his assigns, as though they were expressed, seems to be a mere restatement of the existing law. The benefit of covenants, if capable of running at all, ran to the heir and assign of the corenantee, whether named or not. See Lougher v. Williams, 2 Lev. 92; The Priors' Case, supra; Co. Litt. 385, a.]

Let us now see what covenants have been decided to relate to, or, in the words of the text, touch and concern, the land, in such a way that their benefit or burden is capable of running with it. On this subject it may be laid down as a general rule, that all implied covenants run with the land. Thus it was resolved in Spencer's Case, 4th resolution, "that if a man makes a lease for years by the words concessi, or demisi, which implies a covenant, if the assignee of the lessee be evicted he shall have a writ of covenant." (Since the 7 & 8 Vict. c. 76, s. 6, 8 & 9 Vict. c. 106, s. 4, concessi does not imply a covenant; "demisi" still does one of quiet enjoyment: Bandy v. Cartwright, 8 Exch. 913; and Penfold v. Abbott, 32 L. J. Q. B. 67].) Whether a particular express covenant sufficiently "touches and concerns the thing demised," to be capable of running with the land, is not unfrequently a question of difficulty. The following, however, certainly do so. For quiet enjoyment, Noke v. Awder, Cro. Eliz. 436; Campbell v. Lewis, 3 B. & A. 392. [(As to the meaning of which covenant, see Dennett v. Atherton, L. R. 7 Q. B. 316; 41 L. J. Q. B. 165.)] Further assurance, Middlemore v. Goodale, Cro. Car. 503; Renewal, Roe v. Hayley, 12 East, 464; Simpson v. Clayton, 4 Bing. N. C. 758. To repair, Dean and Chapter of Windsor's Case, 5 Rep. 24, and the principal case. [To put in repair, Martyn v. Clue, 18 Q. B. 661.] To leave possession peaceably to the lessor and his assigns, or to leave in good repair: Vin. Abr. Covenant K. 19 [Martin v. Clue, ubi supra]. Parke, B., in Doe d. Strode v. Seaton, 2 C. M. & R. 730 (see the report of the same case in Tyr. & Gr. 19), was speaking of a case where the reversion had determined, and did not intend to express a doubt that the covenant was one of which, had the reversion continued, the assignee of the reversion might have taken advantage. [To repair, renew, and replace tenant's fixtures and machinery fixed to the soil: secus as to mere utensils or movable chattels. Williams v. Earle, L. R. 3 Q. B. 739; 37 L. J. Q. B. 231. Not to assign without consent of lessor, assigns being named. Ibid., and see West v. Dobb, L. R. 4 Q. B. 634, 38 L. J. Q. B. 289; and for an instance of a breach of this covenant, Varley v. Coppard, L. R. 7 C. P. 505. To leave the land as well stocked with game at the end of the term as it was at the date of the demise. Hooper v. Clark, L. R. 2 Q. B. 200; 36 L. J. Q. B. 79. Secus of a proviso for reëntry in case the lessee, his executors, administrators, or assigns should be convicted of an offence against the game-laws, Stevens v. Copp. L. R. 4 Ex. 20, 38 L. J. Ex. 31; and of a covenant by lessor not to build or keep any house for sale of beer within half a mile of the demised premises, Thomas v. Hayward, L. R. 4 Exch. 311, 38 L. J. Ex. 175, and see Wilson v. Hart, L. R. 1 Ch. 463, 35 L. J. Ch. 569.] To discharge the lessor de omnibus oneribus ordinariis et extraordinariis, Dean and Chapter of Windsor's Case, 5 Rep. 25. To permit the lessor to have free passage to two rooms excepted in the demise, Cole's Case, 1 Salk. 196, reported as Bush v. Cales, Carth. 232; 1 Show. 389. To cultivate the lands demised, in a particular manner, Cockson v. Cock, Cro. Jac. 125. To reside on the premises, admitted by the Court in Tatem v. Chaplin, 2 H. Bl. 133. See 1 Rolle Abr. 521 (l), and see the cases cited in the note to Hinde v. Gray, 1 M. & Gr. 208. Not to carry on a particular trade, Mayor of Congleton v. Pattison, 10 East, 136. A covenant to keep buildings within the bills of mortality insured against fire was in Vernon v. Smith, 5 B. & A. 1, held to run with the land, for st. 14 G. 3, c. 78, enabled the landlord to have the sum insured employed in reinstating the premises, so that the covenant, with the aid of the statute, amounted to a covenant to repair. In Vyvyan v. Arthur, 1 B. & C. 415, the lessee covenanted to grind at the lessor's mill, called Tragamere Mill, all such corn as should grow upon the close demised. This covenant was, in an action brought by the devisee of the lessor against the administratrix of the lessee, held

to run with the land, at all events so long as the mill remained the property of the reversioner. In Easterby v. Sampson, 9 B. & C. 505, and 9 Bing. 644, where an undivided third part of certain mines was leased, and the lease contained a covenant by the lessee that he would build a new smelting mill, and keep it in repair for working the mines, this covenant was held first by the King's Bench, and afterwards in the Exchequer Chamber, to run with the [reversion]. Hemingway v. Fernandes, 13 Sim. 228, A. agreed to make a lease of certain land to B., who was the lessee of a colliery, B. covenanting for himself and his assigns to make a railway over the land, and to carry thereon all coal gotten out of the colliery, or any other land in the same township, that should be intended for shipment or water sale, paying for the carriage 2d. per ton. B. made the railway, and afterwards assigned his interest in the land agreed to be demised and the colliery to C., who also worked other collieries in the township. The Vice-Chancellor is reported to have held that the case fell within the second resolution in Spencer's Case, and that the covenant ran with the land, and bound the assignee.

The latter part of the first resolution in Spencer's Case, namely, that if assigns be not expressly mentioned, they are not bound by covenants relating to things not in existence at the time of the lease, was acted upon in Doughty v. Bowman, 11 Q. B. 444. [The Court of Exchequer, however, in a considered judgment (Minshull v. Oakes, 2 H. & N. 793), has not only expressed an opinion that this well known rule is unreasonable, but has also suggested that Spencer's Case itself decided the contrary. The point is curious, and requires to be considered at some length. In Minshull v. Oakes, the court, after referring to other authorities upon the first resolution, proceeded to say, - "On the other hand, Moore, p. 159, pl. 300, which is evidently Spencer's Case, though the date is later, gives the decision the other way. The explanation may be that Lord Coke is reporting a variety of arguments and opinions expressed, while Moore gives the ultimate decision. Smith v. Arnold, 3 Salk. 4, is directly contrary; and in Bally v. Wells, 3 Wils. 25, the contrary is stated. No reason is given for the alleged difference between where the assignee is and is not named; on the contrary, the reason given for binding in any case an assignee not named, viz. that he takes the benefit and burthen, seems equally to apply to every such case."

The following is a translation of the important part of the anonymous case in Moore:—"In the same term" (Hil. 26 Eliz.) "Gawdy moved on the statute of 32 H. 8, whether, if lessee for life" (it will be observed that in Spencer's Case the lease was by Spencer and his wife for twenty-one years) "covenants for himself, his executors and administrators, to build a wall during his term, and then he assigns over his estate, the grantee of such reversion or the grantor shall have covenant against the assignee; and they all agreed that he should: for Meade said that the statute is that the grantees shall have the like remedies by entry or actions against the assignees, &c., as they ought to have had against the lessees themselves. And notwithstanding that the covenant wants the word assigns, yet each assignee, by the acceptance of possession, has made himself liable to all covenants concerning the land, but not to collateral covenants; and covenants to repair or build walls or houses are covenants inherent to the land, with which the assignee shall, without special words, be charged."

This case no doubt bears a strong resemblance to Spencer's, but there are good grounds for contending that it is not the same, as well from the difference in the statements of the case as from the fact that *Spencer's Case* was in the Queen's Bench, while that in Moore, as appears from the names of the judges and counsel concerned in it, must have been in the Common Pleas (see *Dugdale*,

Orig. Judic., 48, Chronica Series, 94, 95; Foss, Judges of England, vol. 6, p. 158; Moore, 123, pl. 269; 242 pl. 381, Cro. Eliz. 24): moreover, in reports of cases determined not long after, Spencer's Case is cited from Coke, and not from Moore (see Alton v. Hemmings, 2 Bulst. 281, 12 Jac. 1, before Lord Coke himself; and Smith v. Simonds, Comb. 64, 3 Jac. II.). (Nevertheless, as early as 3 W. & M., the two cases seem to have been regarded as the same, see Glover v. Cope, 1 Show., at p. 287, where Spencer's Case is cited, according to the report, by Row arguendo from Moore, 159.) It may also be remarked, in reference to the judgment in Minshull v. Oakes, so far as it rests on a supposed statement in Bally v. Wells, to the contrary of Spencer's Case, that, though such a statement does appear in the report in Wilson, it is not to be found in the report of the same case in Wilmot's notes of cases (see p. 341); and as the opinion of the court was delivered by Wilmot, C. J., himself, this is probably the more accurate report of the two. Indeed, the statement in Wilson would seem to be a clear mistake, as a little further on the true effect of Spencer's Case is stated, and the court are reported to have said: "We rather choose to adhere to Lord Coke's authority, that such a covenant will not bind the assignee unless he be named." In Wilmot's notes of cases, the point is simply put aside as not necessary to the decision of the case before the court, and no opinion is expressed upon it.

However, whatever be the state of previous authorities, the remarks of the Court of Exchequer would seem to be based on sound reason, as, except the arbitrary rule that "the law will not annex a covenant to a thing not in esse," there seems to be no rational distinction between the position of an assignee named and not named as to things not in esse at the time of the demise. As to the benefit or burthen of such a covenant, they would both be in exactly the same position; and if this is a ground, as it is said to be, for holding a named assignee liable, it is also a ground for holding liable one not named. Moreover, the covenant may well be said to be annexed, not to the thing not in esse, but to the land itself upon which the thing is to be made or done, and in respect of which, and not of the thing not in esse, there is the privity of estate, which is the foundation of the running of covenants. In Minshull v. Oakes, the Court did not in terms overrule Spencer's Case, but suggested a distinction, holding that a covenant to repair the messuage, and all other erections and buildings which should or might be erected during the term, ran with the land and bound an assignee, though not named, inasmuch as the covenant was not absolutely to do a new thing, but to do something conditionally, viz. if there were new buildings, to repair them; and that when built they would be part of the thing demised, and consequently the covenant extended to its support; that as the covenant clearly bound the assignee as to things in esse, so also as to things in posse; that there was only one covenant to repair, and the assignee, being clearly included as to part, must be taken to be included as to the whole.

In West v. Dobb, L. R. 4 Q. B. 634, 38 L. J. Q. B. 1, it was contended in argument that the case of Williams v. Earle, L. R. 3 Q. B. 739, cited supra, decided that a covenant by lessee not to assign without license, ran with the land, even though assigns were not expressly named, and Blackburn, J., is reported to have protested against the judgment in that case being taken to decide more than that the covenant ran with the land, and bound the assignee, assigns being mentioned (see L. R. 4 Q. B. p. 637, note). No doubt such was the exact decision in Williams v. Earle; but it would seem probable that that very learned judge intended rather to state exactly the effect of the decision than to attach to the distinction the importance given to it by the report. The covenant not to assign without license is assuredly not one relating to a thing not in esse at the time of the demise, so as to come within the rule above discussed. It is either a cove-

nant which touches and concerns the land, so as to bind assigns, whether named or not, or it is a covenant not touching and concerning the land at all, so as, apart from the doctrine of notice, not to bind assigns, even though named. The case of Williams v. Earle certainly seems to decide that such a covenant does touch and concern the land, in which case, it is submitted, it would, according to the first resolution in the principal case, be binding on assignees whether named or not.]

The liability of the lessee to be sued on his express covenants is not determined by his assigning over his term and the lessor's acceptance of his assignee. Barnard v. Godscall, Cro. Jac. 309; Thursby v. Plant, 1 Wms. Saund. 277, ed. 1871, in notis; but he may be sued on them either by the lessor or, if he have assigned, by his assignee; Brett v. Cumberland, Cro. Jac. 521, 2: and so may his personal representative having assets, ibid.; Hellier v. Caspard, 1 Sid. 266; 1 Lev. 127; Coghill v. Freelove, 3 Mod. 325; 2 Vent. 209; Pitcher v. Tovey, 4 Mod. 76; and the notes to Thursby v. Plant, 1 Wms. Saund. 278. But though the lessee may, after he has assigned and his assignee has been accepted, be sued on his express covenants, it is said he cannot be so on his implied ones. Batcheleur v. Gage, Sir W. Jones, 223; and see 1 Sid. 447; Mills v. Auriol, 4 T. R. 98; 1 Wms. Saund. 305, ed. 1871, in notis; Williams v. Burrell, 1 C. B. 402. Sed quære de hoc. Nor will any action of covenant lie against the assignee of the lessee, except for breaches of covenant, happening while he is assignee, and therefore an assignee may get rid of his future liability by assigning even to a mere pauper. Taylor v. Shum, 1 B. &. P. 21; Le Keux v. Nash, Str. 1222; Odell v. Wake, 3 Camp. 394; Onslow v. Corrie, 2 Madd. 330; though not of his liability for breaches already committed during the continuance of his interest, Harley v. King, 5 Tyrwh. 692 [and in respect of such breaches there is further an implied contract on the part of each successive assignee to indemnify the original lessee. Moule v. Garrett, L. R. 5 Exch. 132, & 7 Exch. 101].

It has been made a question whether, in cases in which the right of action is given to the assignee by 32 H. 8, c. 34, the original covenantee may not still sue. The better opinion is, that he cannot. See Beeley v. Purry, 3 Lev. 154, where the point was, however, not decided. It appears to have been taken for granted in Green v. James, 6 M. & W. 656. And the cases which have settled that the statute transfers the privity of contract militate strongly against the existence of any right in the original covenantee. See Thursby v. Plant, 1 Wms. Saund. 277, ed. 1871; Conran v. Pedder, 2 I. C. L. R. 200.

Here may be noticed the remarkable case of Wakefield v. Brown, 9 Q. B. 209, in which a covenant to repair and paint was made by the lessee with the lessor, the lessor's landlord, and another party to the deed, who had, and appeared by the lease to have, no estate in the land either in fact or by estoppel. The lease having been assigned, an action was brought for breach of covenant against the assignee of the lessee, by the lessor and his superior landlord, who had survived the other covenantee. The question principally discussed in the judgment, namely, whether both the covenantees could join in the action, turned upon the construction of the covenant, and did not relate to the subject of this note. The other question, which seems to have attracted less attention, was, whether, inasmuch as one, if not two, of the covenantees had no estate in the reversion expectant upon the lease containing the covenant, that covenant could run with the land, so as to bind the assignee of the lessee. This latter question, if free from authority, should seem to admit of an easy solution, because, by the common law, as we have seen, and shall presently still further observe, except in the case of landlord and tenant, the burden of covenants does not run with the land, though the benefit does; and, in order to make the benefit of a covenant run

with the land at the common law, it must be entered into with a person having an estate in the land, and when so entered into only enures during that estate; whilst the statute only deals with actions by the assignce of the reversion against the lessee or his assignee, and actions by the lessee or his assignee against the assignee of the reversion; and not with actions by the lessor against the assignee of the lessee, or $e \; contra$, which actions seem therefore to be governed by the common law. The Court of Queen's Bench, however, held the action maintainable, and upon this point gave judgment in the following words: "The other objection, that there is no privity of estate, is certainly not tenable. A covenant to repair and paint clearly runs with the land, and there is privity of estate between the defendant and one of the plaintiffs at all events." The reference in this judgment to the existence of privity of estate between the parties to the action, or any of them, as being important to the decision of the question, is somewhat perplexing; privity of estate between the original parties and those who either claim under them, or are sought to be charged with the burden they have created, appearing alone to be material, either at the common law or under the statute. The court, indeed, appear to have either overlooked or disregarded the circumstance that the covenant was with the reversioner and a person having no estate, jointly; a sort of covenant which, it is submitted, does not run with the land, but is collateral, and so the assignee of the lease not liable upon it. In Magnay v. Edwards, 13 C. B. 479, under similar circumstances, the Court of Common Pleas, in deference to the authority of Wakefield v. Brown, gave judgment for the plaintiff, expressly guarding themselves, however, from being supposed to concur in the reasons upon which the judgment in that case proceeded.

Covenants not between Lessor and Lessee.

Next, as to covenants running with the lands in other cases than those between landlord and tenant. These may be divided into the two following classes:—

- 1. Covenants made with the owner of the land to which they relate.
- 2. Covenants made by the owner of the land to which they relate.

With respect to the former of these classes, viz. covenants made with the owner of the land to which they relate, there seems to be no doubt that the benefit, i. e. the right to sue on such covenants, runs with the land to each successive transferee of it, provided that such transferee be in of the same estate as the original covenantee was. Of this description are the ordinary covenants for title: see Middlemore v. Goodale, 1 Rolle's Abr. 521 K. Pl. 6; Cro. Car. 503, 505; Sir W. Jones, 406; Shepp. Touch.171; Kingdon v. Nottle, 4 M. & S. 53; Campbell v. Lewis, 3 B. & A. 392; Lewis v. Campbell, 8 Taunt. 715; which latter case, as well as Noke v. Awder, Cro. Eliz. 373, 436, shows that there is no difference between the right of an assignee of freehold, and that of the assignee of a chattel real, to sue on covenants running with the land. Of this description also is the case of the Prior reported in the text, that of the two Coparceners, and the anonymous case in Moore, 179, cited by Littledale, arguendo, in Milnes v. Branch, 5 M. & S. 417 [and Sharp v. Waterhouse, 7 E. & B. 816].

In all these cases the covenant is for something relating to the land, and the assignee of the land is the person entitled to sue upon it. See *Middlemore* v. *Goodale*, 1 Rolle's Abr. 521; *Spencer* v. *Boyes*, 4 Ves. 370.

When such a covenant is made, it seems to be of no consequence, whether the covenantor be the person who conveyed the land to the covenantee, or be a mere stranger. Thus in the Prior's case reported in the text, and in Co. Litt.

384, b, the Prior was a stranger to the land of the covenantee; and there is a good reason for this assigned in the above passage in Co. Litt., where the law is said to be so, to give damages to the party grieved; in other words, in order that the person who is injured by the non-performance of the covenant, who is always the owner of the land pro tempore, may be also the person entitled to the remedy upon it by action. Indeed, Middlemore v. Goodale, Noke v. Awder, and Campbell v. Lewis, above cited, were all cases in which the covenantor was also the person who conveyed the land to the covenantee; and Sir Edward Sugden, in the Law of Vendors and Purchasers [p. 584 et seq. 14th ed.], expresses an opinion, that to enable the assignee of land to take advantage of covenants they must have been entered into by a prior owner thereof. This, however, is contrary to the Prior's case in the text, contrary to the case of the Coparceners, contrary also to the anonymous case in Moore, 179, and to the opinion of the Real Property Commissioners, expressed in their 3d Report; and Sir Edward Sugden himself declares that the consequences of applying such a doctrine to covenants entered into by a vendor, who is often only a mortgagor, or cestui que trust, would be most alarming. See a learned note in "Jarman's Bythewood," vol. 7, pages 572, 3, vol. 9, page 354, of Mr. Sweet's edition.

It would be wrong to omit mentioning that, since the publication of the first edition of this work, a case occurred in the Court of Exchequer, bearing in some degree upon the above proposition. The case alluded to is Raymond v. Fitch, 5 Tyrwh. 985, in which the question was, whether the executors of one who had demised land, excepting the trees (the circumstance that the trees were excepted does not appear in the statement of the case, but is to be collected from the observations of the counsel and judges, see page 991 ad finem, and the judgment), could sue upon a covenant not to fell or lop them, which had been broken during the testator's lifetime. It was argued on behalf of the defendant, that where a covenant runs with the land and descends to the heir, there, though there may have been a formal breach in the testator's lifetime, still, if the substantial damage happened after his death, the real, not the personal, representative ought to be plaintiff. See Kingdon v. Nottle, 1 M. & S. 355; 4 M. & S. 53; King v. Jones, 5 Taunt. 418 [and Goodman v. Boycott, 2 B. & S. 1; 31 L. J. Q. B. 69]. Lord Abinger, however, delivering the judgment of the court, distinguished those cases by saying, "There is no doubt that the covenant here is purely collateral, and does not run with the land:" and he added, "for the breach of such a covenant after the death of the covenantee, the heir or devisee of the land on which the trees grew could not sue." His lordship does not state whether he based this opinion on the ground that the covenant not to cut down the trees did not sufficiently touch and concern the land, or whether on the ground that the benefit of a covenant made by a stranger (which the lessee was quoad the trees) was incapable of running with the land to which it related, to the heir or devisee thereof. The point was not necessary for the decision of the case before their lordships, for the court appears to have been of opinion that the loss of the shade and casual profits of the trees during the testator's lifetime was a sufficient injury to the personal estate to vest a right of action in his executor; and it seems unfortunate, therefore, that the dicta in the case should have tended to cast any additional doubt on a doctrine so highly reasonable as that the right of action upon a covenant touching and benefiting the land shall devolve along with the land itself to each successive owner.

But though it be not necessary that the covenantor should be in any wise connected with the land, it is absolutely essential that the covenantee should, at the time of the making of the covenant, have the land to which it relates. On this point the text is express, viz., "If the covenant were to say divine service

in the chapel of another, there the assignee shall not have an action of covenant, because the chapel doth not belong to the covenantee; as it is adjudged in 2 H. 4, 6, b.;" see Co. Litt. 384, b., 385, a.; and Webb v. Russell, 3 T. R. 393. In such a case, however, the covenantee may sue, though his assignee cannot. Stokes v. Russell, 3 T. R. 678.

It has been above stated, that, in order that the assignee may sue on such a covenant, he must be in of the same estate in the land which the party had with whom the covenant was originally made, for the covenant is incident to that estate. This rule might possibly be productive of very serious and disagreeable consequences; for when lands are conveyed (as has repeatedly been done for the purpose of barring dower) to such uses as A. shall appoint, and in default of appointment to A. for life, remainder to B., his executors and administrators, during the life of A., remainder to A. in fee, and A. exercises the power of appointment in favor of a purchaser, that purchaser comes in paramount to A. and above the estate of which he was seized, which is defeated by the exercise of the power as if it never had existed. There is consequently no sameness of estate between A. and the purchaser, which latter will therefore not be entitled to the benefit of covenants entered into with A., since those covenants were incident to the estate which has now been defeated by the appointment: see Roach v. Wadham, 6 East, 289. To obviate this evil, it became usual, whenever the conveyance transferred a seisin to serve uses, - as, for instance, when it was by way of feoffment, or lease and release, - to enter into the covenants with the feoffee or releasee to uses, and his heirs, the consequence of which is believed to be, that the benefit of the covenants, being annexed to the seisin, is transferred to, and in a manner executed in, the various persons who become from time to time entitled under the uses which that seisin serves. See Sugd. Gilb. U. 186, note. [The lessee of the covenantee may enforce a restrictive covenant made with the covenantee and his assigns. Taite v. Gosling, 11 Ch. D. 273; 48 L. J. Ch. 397.]

With respect to the second of the above two classes, namely, covenants entered into by the owners of land, great doubt exists whether these in any case run with the lands, so as to bind the assignee of the covenantor. One inconvenience which would be the result of holding them to do so is, that the assignee would frequently find himself liable to contracts of the very existence of which he was ignorant, and which, perhaps, would have deterred him from accepting a conveyance of the land, if he had known of them; and the reason assigned in the first Institute for allowing the benefit of a covenant relating to land to run therewith, viz. to give the remedy to the party grieved, does not apply to the question respecting the burden thereof. This question might have arisen in Roach v. Wadham, 6 East, 289. There John Russ being seized of an undivided third part of a certain messuage, and the plaintiffs of the two other undivided third parts, they conveyed the whole to Coates and his heirs, to such uses as Watts should appoint, and, subject thereunto, to the use of Watts in fee, "yielding and paying, and the said William Watts, and by his direction the said T. Coates did, and each of them did, grant out of the said messuage to the plaintiffs, their heirs and assigns, for ever, the yearly fee farm rent of 28l. payable quarterly." Then followed a covenant by Watts, for himself, his heirs and assigns, to pay the rent to the plaintiffs, their heirs and assigns. Then a similar rent of 14l. was reserved to Russ. Watts afterwards "granted, bargained, sold, aliened, released, ratified, and confirmed, and did also limit, direct, and appoint," the premises in question to Wadham, Sterens, and Powell (a trustee), habendum to Wadham, Stevens, and Powell, and the heirs and assigns of Wadham and Stevens, as tenants in common, subject to the rent of 421., which

Wadham and Stevens covenanted with Watts to pay in equal shares and proportions. Wadham died, leaving the defendant his devisee in fee and executor: the moiety which Wadham had covenanted to pay of the 28l. rent became after his death three years in arrear; and this action having been brought for the recovery of those arrears, a case was ultimately stated for the opinion of the Court of King's Bench, the question in which was "whether the defendant as executor or devisee of the testator Wadham were liable at law to an action of covenant on the said covenant made by Watts." The court held that he was not liable, for that the conveyance by Watts to Wadham, Stevens, and Powell, operated as an appointment under the power created by the conveyance from Russ and the plaintiff to Coates, and therefore, even supposing the covenant made by Watts with the plaintiffs to be capable of running with the land and binding Watts' assignee, still it could not affect Wadham, who was not privy in estate to Watts, but came in paramount to him.

Brewster v. Kitchell is another case often referred to on this question: it is reported in Lord Raym. 317; Comb. 424, 466; 1 Salk. 198; 12 Mod. 166; Holt, 175, 669; with the arguments of counsel, 5 Mod. 368. It was a feigned action on a wager, whether the defendant had a right to deduct 4s. in the pound out of a rent-charge granted to the plaintiff's ancestor out of certain lands in Bucks of which the defendant was terretenant, which tax of 4s. in the pound was granted in 4th & 5th W. & M. Upon a special verdict it appeared that R. Langford, being seized in fee of the manor of Balmore, granted to Ellen Brewster a rentcharge out of the manor, to her and her heirs, and there was a covenant for further assurance, and this memorandum was endorsed on the deed, viz.: "It is the true intent and meaning of these presents, that the within-named Ellen Brewster, and her heirs, shall be paid the said rent-charge without deducting of any taxes for the said rent," &c. Afterwards, R. Langford, on the 8th of July, 1652, in pursuance of the covenant in the first deed, confirmed the rent to Ellen Brewster and her heirs, and covenanted that the rent should be paid at two certain feasts, free of all taxes. The report proceeds thus: "After several arguments, Holt, C. J., pronounced the opinion of the court, and (by him) the question is upon this special verdict, whether the covenant indorsed upon the deed of the 26 Nov., 1649, or the covenant in the deed of the 8 July, 1652, be sufficient to bind the grantor and his heirs to pay the rent, free of all taxes hereafter to be charged upon it by act of parliament? And all the judges were of opinion that this covenant binds the grantor and his heirs to pay the rent, free of the 4s. in the pound tax." Thus far, therefore, the question of the burden of the covenant running with the lands does not appear to have been taken into consideration. However, in a subsequent part of his judgment, the report proceeds to state, Lord Holt "made another question, which was not observed at the bar, nor by any of the other judges, viz.: whether the terretenant is liable to an action upon this covenant; and he was of opinion that he was not. For (by him) if tenant in fee grants a rent-charge out of lands, and covenants to pay it without deduction, for himself and his heirs, you may maintain covenant against the grantor and his heirs, but not against the assignee, for it is a mere personal covenant, and cannot run with the land. . . . And for a case in point, he cited Hardr. 87, pl. 5, Cook v. Earl of Arundel. . . . Therefore, since it does not appear that the defendant is bound by this covenant (for non constat whether he is terretenant or not, or what he is), for this reason he was of opinion that judgment ought to be given for the defendant. But the other three judges seemed to be in a surprise, and not in truth to comprehend this objection, and therefore they persisted in their former opinion, talking of agreements, intent of the party, binding of the land, and I know not what. They gave judgment for the plaintiff, against the opinion of Holt, C. J., for the reasons aforesaid."

The above account is extracted, verbatim, from Lord Raymond. The account of the disagreement between Lord Holt and the three judges, given in Salkeld, is extremely jejune, being comprised in a marginal note of about six words. But in 12th Mod. is a report of this same case of Brewster v. Kitchell, which, if accurate, and there seems to be no reason for distrusting it, places the matter in a far clearer and more satisfactory light. Lord Holt is there made to say, in delivering his judgment, "If this rent was granted, so to be paid, it would be another matter, but here is only a covenant and no words amounting to a grant; and therefore there can be no relief in this case against the terretenant, but in equity; and therefore, for this point, I do not see how the plaintiff can have his judgment; for if this covenant should charge the land, it would be higher than a warrantia chartæ, which only affects the land from judgment therein given: But the other three judges" (says the reporter) "thought that this covenant might charge the land, being in the nature of a grant, or at least a declaration going along with the grant, showing in what manner the thing granted should be taken." So that the real difference between Lord Holt and the three judges appears to have been, not whether an action of covenant could be maintained against the defendant as assignee of the land, but whether that which Lord Holt considered a covenant was not, in reality, part of the grant; for, if it were, the plaintiff was entitled to judgment beyond all dispute, the action not being one of covenant, but a feigned issue to ascertain the net amount of the rent-charge. So that, considering the case in this light, there is Lord Holt's opinion that a covenant to pay the rent-charge would not run with the land, — an opinion from which none of the other judges dissented; the point on which they really differed being whether that which the Lord Chief Justice considered a mere covenant was not, in point of fact, part and parcel of the grant; in which case Lord Holt himself had admitted that "it would be another matter." With respect to the accuracy of the report in Mod., it must be repeated, that there seems little reason for distrusting it. It is given at considerable length, and cannot be said to disagree with that of Lord Raymond, who admits that he had no distinct remembrance of the grounds on which the judges based their dissent from Holt's opinion.

In Cook v. The Earl of Arundel (the case cited by Lord Holt from Hardres, reported also in 1 Abr. Eq. 26), the Duke of Norfolk being seized of Blackacre and Whiteacre, subject to a certain rent, granted Blackacre to A., covenanting that it should be discharged of the rent, and granting, afterwards, Whiteacre to B. A. filed a bill to charge Whiteacre with the whole rent, urging that the covenant ran therewith, and bound B. But the court thought the covenant only binding on the Duke of Norfolk and his representatives, and dismissed the bill. (See Lord Cornbury v. Middleton, Cases in Chancery, 208.)

The case of Holmes v. Buckley, 1 Abr. Eq. 27, is another case thought to bear upon this point, and was as follows: A. and R., his wife, being seized in right of R. of two pieces of ground, granted by indenture a watercourse to J. H. and his heirs, through the said two pieces of ground, and covenanted for them, their heirs and assigns, to cleanse the same; and that all fines and recoveries to be levied or suffered of the grounds should enure to the strengthening and confirming the said watercourse. Afterwards a recovery was had, and a deed executed, declaring the uses to be as aforesaid. The watercourse, by mesne assignments, came to the plaintiff, and the two pieces of ground to the defendant, who built on the same, and much heightened the ground which lay over the watercourse, and rendered it much more chargeable and inconvenient to repair, and, as it was

alleged and in part proved, the building had much obstructed the watercourse. And so the bill was for establishing the enjoyment of the watercourse, and that the defendant, and all claiming under him, might from time to time cleanse the same, according to the covenant. It was objected, that the covenant, being a personal covenant, was not at all strengthened by the recovery; and that the plaintiff, and those under whom he claimed, being sensible of it, had for forty years cleansed the same at their own charges. But the court was of opinion, that this was a covenant which ran with the land, and was made good by the recovery; and though the plaintiff had cleansed the same at his own charge, while it was easy to be done, and of little charge, yet, since the right was plain upon the deed, and the cleansiny made chargeable by the building, it was reasonable the defendant should do it, and decreed accordingly, and gave the plaintiff his costs.

It will be observed on this case, that not only may it be urged here, as in Brewster v. Kitchell, that the covenant was, in fact, part of the grant, but that, even if there had been no covenant, the defendant was guilty of a wrongful act, when he obstructed and injured the plaintiff's watercourse, subject to which he took his own estate, and of the existence of which he had notice, for the deed declaring the uses of the recovery, under which deed he must have claimed, made mention of the previous grant of the watercourse; and the court appears to have relied upon the wrongful obstruction as a ground of its decree, as is plain from the words, "and the cleansing made chargeable by the building." On the other hand, if the effect of the case be taken to be, that the court thought the covenant one on which an action might have been maintained at law by the plaintiff against the defendant, it seems questionable whether it do not prove too much; for, as both the parties were assignees, one of the land, and the other of the watercourse, it would, in order to support such an action of covenant, be necessary to hold, not merely that the burden of the covenant ran with the land, but that the benefit of it ran with the watercourse; for, otherwise, the plaintiff, not being the original covenantee, would have no right to action: and it would probably be found somewhat difficult to contend that a covenant could run with such an easement as a watercourse. See Milnes v. Branch, 5 M. & S. 417, and post. Vide tamen E. of Portmore v. Bunn, 1 B. & C. 694.

The case of Barclay v. Raine, 1 S. & Stu. 449, has been thought to bear upon this controversy, but a close examination will show that it cannot with propriety be cited as an authority on either side. A. being seized of Blackacre and Whiteacre, under the same title, and comprised in the same deeds, sold Blackacre to Thring, and delivered the deeds to him, Thring covenanting for their production to A., his heirs, executors, administrators, and assigns. This deed was lost, and, though a copy of it existed, the copy was in a mutilated state, partly illegible. A. afterwards sold Whiteacre to Barclay, the father of the plaintiffs: Thring then sold Blackacre to James and John Slade, who refused to give a fresh covenant for the production of title-deeds. On the sale to the Slades, part of the purchase-money was secured by mortgage; and the titledeeds, together with the mortgage-deed, were lodged with Thring. The plaintiffs, who had contracted to sell Whiteacre to the defendant Raine, applied to Thring for a covenant to produce the title-deeds, and he executed a covenant by which he covenanted with the defendant, Raine, to produce the title-deeds. while he should continue mortgagee. The defendant objected to this as insufficient, and Thring then executed another deed, in which he acknowledged the execution of the first covenant, and also that the deeds were, at the date of this last deed, in his possession. Under these circumstances, the question was, whether the defendant could be compelled to complete his purchase, and the

Vice-Chancellor (Sir J. Leach) decided that he could not; and is reported, in 1 Sim. &. Stu. 545, to have said on that occasion, "that equity never compels a purchaser to take without the title-deeds unless he have a covenant to produce them; that a mere equitable right to their production, even if it existed, would not be sufficient, and that Thring's covenant to produce did not run with the lands." It is obvious that this last observation, if made at all, could not have been intended to apply to the second covenant executed by Thring, which would be clearly insufficient, inasmuch as it was restrained to the time during which he should continue mortgagee; when he ceased to be mortgagee the Slades would be entitled to the deeds, and it was therefore necessary that some covenant should exist, the effect of which should last beyond that period; and so the master had reported. It was therefore immaterial whether the second covenant would or would not run with the land, and the true question was: 1st, whether the covenant first executed by Thring would bind the Slades; 2dly, if so, whether it would bind them for the benefit of Raine; and, 3dly, supposing the covenant would bind the Slades, and would enure to Raine's benefit, whether there was sufficient legal evidence of its contents; for, if not, it would of course be as useless as if it never had existed. (See the judgment of the Master of the Rolls in Bryant v. Busk, 4 Russ. 1.) Now the first of these points would have involved the question whether the burden of Thring's covenant would run with Blackacre to his vendees, the Slades? The second would have involved the question, whether the benefit of it would run along with Whiteacre, from A., the covenantee, to the Barclays, and from them to Raine? But it became unnecessary to decide either of these two points, because it appears clear that the third point was against the vendor; in other words, it appears clear that, whatever might have been the effect of the covenant, there was no legal evidence of its contents. The deed was lost, the copy was mutilated and partly illegible; and, if entire, would only have been secondary evidence of the original if duly proved to be a true copy, and it does not appear that that could have been done: and the deed lastly executed by Thring, even had it set out the contents of the first deed, which in all probability it did not, would not have been evidence against the Slades, as it was not executed till after Thring had parted with his interest in the lands to them. The questions, therefore, whether either the benefit or burden of Thring's covenant ran with the land, did not arise; and it might have been supposed that the Vice-Chancellor, in pronouncing judgment, would have omitted all consideration of them, had it not been that the reporter puts into his mouth the following words: "Thring's covenant to produce does not run with the land." However, in the 7th volume of Jarman's Bythewood, p. 375, under the report of Barclay v. Raine, I find the following note: - "His Honor lately denied his having used the expression here imputed to him; he did not say that Thring's first covenant did not run with the land (for his Honor thought it clearly did), but that the second covenant was restricted to the period of his being mortgagee." Rolls, 28th July, 1830. It seems, therefore, that Sir John Leach's private opinion was, that Thring's first covenant did run with the land; but whether he thought that the benefit of it ran with Whiteacre, or the burden with Blackacre, or that both benefit and burden ran with the land, is left completely in ambiguo. One thing, however, is quite plain, viz. that Barclay v. Raine is no decison on the present question; since, had his Honor thought that there was a sufficient covenant, and sufficient evidence of its contents, he must have decided in favor of the plaintiffs, and against Raine, who would then have had no excuse for not completing his purchase.

Covenants like that to pay a rent-charge issuing out of the land have reference to an interest possessed by the covenantee independently of the covenant,

but there are other covenants unconnected with any interest in the land, such as a covenant by the owner of the land, that it shall never be built upon, or never planted, or imposing any other restriction on the mode of its enjoyment, in favor of a person having no property therein. The possibility of making these covenants run with land has been questioned, not merely on the general ground above stated, namely, that the burden of a covenant cannot run with land except between landlord and tenant, though the benefit thereof may; but also on the ground that they infringe the rule of law against perpetuities, by tending to impede the free circulation of property. An instance of a covenant of this sort is to be found in a note to Fitzherbert's Natura Brevium, fo. 145, for which he cites the Year-book 4 H. 3, 57, not in print. The note is as follows: - "A man covenants that neither he nor his heirs shall erect any mill in such a place, and an action of covenant is thereupon brought by the heir, and well." I presume that the words by the heir signify the heir of the covenantee, and probably the main question in that case was whether the heir, who had perhaps inherited some mill which the covenant was framed to protect, or the executor of the covenantee, should bring the action. It has been remarked by very high authority, that, "in the case cited by Hale [the supposed commentator on Fitz. N. B.], the covenant was held to be good; but that does not go far towards removing the doubt, for that case occurred at a period long before the law of perpetuity was introduced," 3d Report of the R. P. Commissioners, 54. In addition to which it may be observed, that even had the case occurred since the rule against perpetuities, it might not have effectually resolved the doubt as to the operation of that rule, for the action was brought against the covenantor himself, of whose liability there could be no question; and as the word assigns does not occur in the covenant, it may be doubted whether the assignees would have been bound by it, as it can hardly be said to relate to a thing in esse, parcel of the covenantor's land; and if the assignees would not be bound by it, it could have no tendency to impede the circulation of the land, or to create a perpetuity.

These subjects were discussed in the case of Keppel v. Bailey, in the Court of Chancery, 2 Myl. & K. 517, in which the questions were elaborately argued, and every authority on either side, it is believed, cited, either by counsel, or by the Lord Chancellor (Brougham) in delivering his judgment. In that case, certain persons having formed themselves into a company for the establishment of a railroad, called the Trevil, Edward and Jonathan Keppel, who held the Beaufort iron-works under a long lease, had covenanted with the proprietors of the railroad and their assigns, that they, their executors, administrators, and assigns, would procure all the limestone wanted for the iron-works from the Trevil quarry, and carry it along the Trevil railroad, paying a certain toll. Edward and Jonathan Keppel assigned their lease of the iron-works to the defendants, who began to construct a railroad to other lime-quarries situated eastward of the Trevil quarry. [The defendants took with notice of the covenant by Edward and Jonathan Keppel.] On a bill for an injunction to restrain them from using that or any other new road, it was, among other points, objected to the covenant that it was void, as tending to create a perpetuity, that it was void as in restraint of trade, and that it was not such a covenant as would run with the lands, so as to bind the defendants, as assignees of the iron-works. The Lord Chancellor appeared to think that it could not be invalidated on the ground of perpetuity, or of restraint of trade.

Upon the great question, however, viz. whether the covenant were capable of running with the Beaufort iron-works, so as to bind the defendants as assignees thereof, his lordship expressed a very decided opinion in the negative:—"Assuming that the Keppels covenanted for their assigns of the Beaufort works,

could they by a covenant with persons who had no relation whatever to those works, except that of having a lime-quarry and a railway in the neighborhood, bind all persons who should become owners of those works, either by purchase or descent, at all times, to buy their lime at the quarry, and carry their iron on the railway; or could they do no more, if the covenant should not be kept, than give to covenantees a right of action against themselves, and recourse against their heirs and executors, as far as those received assets? Consider the question first upon principle. There are certain known incidents to property and its enjoyment, among others, certain burthens wherewith it may be affected, or rights which may be created, or enjoyed with it, by parties other than the owner, all which incidents are recognized by the law. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient, both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing men the fullest latitude in binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no detriment, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a different fashion, and it would be hardly possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public, as well as of a simple, nature, and no one who sees the premises can be ignorant of what all the vicinage knows." (See Ackroyd v. Smith, 10 C. B. 164.) "But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his with obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations on the premises, besides many other restraints, as infinite in variety as the imagination can conceive; for there can be no reasen whatever in support of the covenant in question, which would not extend to every covenant that can be devised. The difference is obviously very great between such a case as this and the case of covenants in a lease whereby the demised premises are affected with certain rights in favor of the lessor. The lessor or his assignees continue in the reversion while the term lasts. The estate is not out of them, though the possession is in the lessee or his assigns. It is not at all inconsistent with the nature of property that certain things should be reserved to the reversioner all the while the term continues; it is only something. taken out of the demise, some exception to the temporary surrender of the enjoyment. It is only that they retain more or less partially the use of what was wholly used by them before the demise, and what will again be wholly used by them when that demise is at an end."

The question was also discussed at considerable length in *The Duke of Bedford* v. *The Trustees of the British Museum*, 2 Mylne & K. 552. That case, however, turned at last upon a point purely of equity, the court conceiving, that, however the rights of the parties might be at law, it was a case in which equity ought not to interfere. See *Collins* v. *Plumb*, 16 Ves. 434.

In Randall v. Rigby, 4 M. & W. 130, the defendant had covenanted for the payment of an annuity or rent issuing out of land. "No doubt," said Parke, B., "this covenant is collateral or in gross in one sense, that it does not run with the land, or rent."

In Bristow v. Wood, 1 Collyer 480 (more fully reported 14 L. J. 50), a pur-

chaser was discharged from his contract upon a doubt whether the land was not bound by a covenant by the vendor not to build houses in courts, or of a less value than 300l., not to erect a steam-engine or manufactory, or to carry on any trade that might be a nuisance to the neighborhood, although the purchaser at the time of the contract had no notice of the covenant [and see per Romilly, M.R. Clements v. Welles, L. R. 1 Eq. 200]. In Whatman v. Gibson, 9 Sim. 196, and Mann v. Stephens, 15 Sim. 379, the Vice-Chancellor restrained, by injunction, assignees who had purchased with notice of similar covenants. See also Schreiber v. Creed, 10 Sim. 9.

In Tulk v. Moxhay, 2 Phil. 774, it was laid down by Lord Cottenham, that a covenant made by the purchaser of land that he and his assigns would use, or abstain from using, the land in a particular way, may be enforced in equity against all purchasers, with notice of the covenant, without reference to the question whether such covenant run with the land or not; and Lord Cottenham there explained the judgment of Lord Brougham in Keppel v. Bailey, and stated that this equity is wholly independent of the common-law question as to the covenant running with the land. [The doctrine of Tulk v. Moxhay has been followed and extended in subsequent cases, and Keppel v. Bailey must now be considered as overruled so far as it ignores the effect of taking with notice of a restrictive covenant, Luker v. Dennis, 7 Ch. D. 227; 47 L. J. Ch. 174. And since by the Supreme Court of Judicature Act, 1873, ss. 24 & 25, law and equity are to be concurrently administered, and in cases of conflict the rules of equity are to prevail, it would seem that wherever the facts admit of it these cases must henceforth be decided upon the question of notice alone.

The doctrine of Tulk v. Moxhay, however, cannot be extended to other than restricted covenants. Therefore, where A. conveyed land to B. to the use that B. should pay to A. an annual chief-rent, and B., for himself, his heirs, executors, and assigns, covenanted with A., his heirs, executors, and assigns, to pay the rent and to build, keep in repair, and, when necessary, rebuild messuages on the land of the value of double the rent, it was held that an assignee to whom A. had conveyed the chief-rent with the benefit of the covenant could not compel the assignee of B., who took with notice of it, to put the messuages in repair. Haywood v. Brunswick Benefit Building Society, S.Q. B. D. 403; 51 L. J. Q. B. 73, overruling Cooke v. Chilcott, 3 Ch. D. 694, so far as it asserts a contrary view. It was also held that the covenant could not be enforced at law apart from the equitable doctrine of notice. In L. & S. W. R. Co. v. Gomm, 20 Ch. D. 562; 51 L. J. Ch. 530, Haywood v. Brunswick, &c., Soc. was approved and followed. See further Cole v. Sims, 23 L. J. Ch. 258; Child v. Douglas, 5 De G. M. & G. 739; Jay v. Richardson, 31 L. J. Ch. 398; Parker v. Whyte, 32 L. J. Ch. 520; Western v. McDermott, L. R. 1 Eq. 499, 2 Ch. 72; 35 L. J. Ch. 190; Morland v. Cook, L. R. 6 Eq. 252. In the last two cases, Romilly, M.R., clearly intimated an opinion that the burden of covenants may run with the land. Western v. McDermott was decided on appeal on the ground that the defendant took with notice of the covenant; a like opinion was expressed by Malins, V.-C., in Cooke v. Chilcott, 3 Ch. D. 694. See also Clements v. Welles, L. R. 1 Eq. 200; Wilson v. Hart, L. R. 1 Ch. 463; Fielden v. Slater, L. R. 7 Eq. 523. As to what amounts to constructive notice in such cases, ibid.; Patman v. Harland, 17 Ch. D. 353; 50 L. J. Ch. 642; and 45 & 46 Vict. c. 39 (The Conveyancing Act, 1882), s. 3. Quare, whether an assignee with notice of a covenant to build can be compelled to allow it to be performed by the covenantor. Andrew v. Aitken, 22 Ch. D. 218; 52 L. J. Ch. 294.

In Keates v. Lyon, L. R. 4 Ch. 218, one Sharp, being possessed of land, had sold a portion of it to Langton, taking from him and his assigns certain restric-

tive covenants as to the class and form of buildings to be erected upon the land. He subsequently sold portions of his remaining land to other purchasers, who were not shown to have had notice of the covenants made by Langton. Sharp afterwards repurchased from Langton the land which he had sold to him, and the question was whether Sharp could sell the land so repurchased discharged from Langton's covenants. In other words, whether the benefit of those covenants had run to the purchasers from Sharp and the burden to the assignee of Langton. Sharp was obviously a purchaser with notice, so that there was no difficulty as to the running of the burden if the intermediate purchasers were entitled to the benefit. The court, distinguishing Whatman v. Gibson, Cole v. Sims, Child v. Douglas, and Western v. McDermott, held that they were not, and that Sharp could make title to the repurchased lands discharged from the restrictive covenants, on the ground that it did not appear that there was any agreement or intention to confer on the intermediate purchasers the benefit of those covenants.

A similar decision was pronounced by Hall, V.-C., in *Renals* v. *Cowlishaw*, 9 Ch. D. 125; 48 L. J. Ch. 33, and affirmed by the C. A. 11 Ch. D. 866; 48 L. J. Ch. 830, on a question whether the assignees of the vendor of an estate, a portion of which had been sold subject to a restrictive covenant not to carry on particular trades, were entitled to enforce the covenant against the assignees of the vendee. There was no proof that the plaintiffs were aware of the existence of the covenant in question, or had purchased on the faith of it. It is stated in the head-note that the defendants took with notice of the covenant. The Vice-Chancellor and the Court of Appeal, however, decided the case against the plaintiffs, on the ground that the benefit of a restrictive covenant does not run to a purchaser on a mere assignment of the land of the covenantee unless he took under such circumstances as to show that he contracted and intended to buy the benefit of the covenant.

It is to be observed that the covenant in question was one which, as between landlord and tenant, is capable of running with the land, Mayor of Congleton v. Pattison, supra, p. 81. It would seem, therefore, that, as pointed out by Lord Brougham, in Keppel v. Bailey, restrictive covenants, when made with persons having no interest in the land of the covenantor, stand on a different footing from the like covenants when made with owners of the reversion, and the benefit of them does not pass to an assignee unless it can be inferred that the parties intended or contracted that it should pass.]

In Moore v. Greg, 2 Phil. 717, Lord Cottenham decided that an equitable assignee of a lease is not liable to be called upon in equity to fulfil the covenants in like manner as he would have been bound to do if the assignment had been complete at law. [See Cox v. Bishop, 26 L. J. Chan. 389.] It is apprehended, however, that an equitable assignee of a lease would, like any other purchaser with notice, be restrained by a court of equity from infringing a covenant like that in Tulk v. Moxhay. The distinction is obvious between the enforcement of "an equity attached to the property" (to use the words of Lord Cottenham), the breach of which cannot be adequately compensated by damages in an action against the person legally liable on the covenant, and the enforcement in equity of the performance of covenants to pay rent and the like, the non-performance of which is capable of being fully compensated in damages, while the person in whom the lease is legally vested is liable upon those covenants.

Upon the whole, there appears to be no authority [which has decided apart from the doctrine of notice] that the burden of a covenant will run with land in any case, except that of landlord and tenant; while the opinion of Lord Holt in Brewster v. Kitchell, that of Lord Brougham in Keppel v. Bailey, and the

reason and convenience of the thing, all militate the other way. [This question was again much considered in the recent case of Austerberry v. Corporation of Oldham, 29 Ch. D. 750, where all the cases which might seem to countenance the opinion that the burden of covenants between persons other than landlord and tenant could run with the land were reviewed, and the court, though not absolutely deciding the point, inclined to the opinion that the burden cannot run except between landlord and tenant. In that case A. conveyed to trustees in fee a piece of land intended to form part of the site of a road which was proposed to be made across the land of A, and other proprietors who made grants in similar terms, and the trustees, for themselves, their heirs and assigns, covenanted with A., his heirs and assigns, that they would form the land conveyed into a road, to form part of the proposed line of road, and would forever afterwards keep and maintain the said road and every part of it in good repair. The road was made, and A. afterwards conveyed to the plaintiff the land adjoining the plot conveyed on each side of the road. The defendants were the assignees of the trustees, and the question was whether the benefit of the covenant to maintain and repair ran to the plaintiff and the burden to the defendants. Cotton, L.J., and Lindley, L.J. (the latter not quite so strongly), were of opinion that the benefit did not run to the plaintiff. Fry, L.J., entertained some doubt on this point, inclining to the view that it might. On the question of the burden running to the defendants, Cotton, L.J., did not pronounce a decided opinion, but Lindley and Fry, L.J.J., agreed in holding that it did not. It is difficult to conceive any case in which the burden could be held to run if it was incapable of running in this instance, and though the court guarded themselves from affirming the general proposition, it is submitted that the point is virtually decided by this case, and that, except between landlord and tenant, the burden of covenants cannot run with the land at law. See further Bailey v. Stephens, 12 C. B., N. S. 91; 31 L. J. C. P. 226, per Willes, J.; and Ellis v. The Mayor, &c., of Bridgnorth, 15 C. B. N. S. 78; 32 L. J. C. P. 273; Richards v. Harper, L. R. 1 Exch. 199, 35 L. J. Exch. 130, where the majority of the court seem to have thought that the burthen of a covenant with the owner of adjacent land, to let him mine there without paying for injury to the covenantor's land, would not run with the land.

It should be observed that in some cases the terms of a covenant may operate as a grant of an incorporeal hereditament, so as to render it unnecessary to determine whether quā covenant the burthen of it runs with the land: Rowbotham v. Wilson, 8 H. of L. Ca. 348; 30 L. J. Q. B. 49; Gale on Easements, 5th edit., p. 86. So a right may be reserved subject to a condition or qualification which will bind assignees, as, for instance, if a right to mine under land conveyed be reserved by the grantor for himself and assigns "so that compensation be paid for damage done to the surface by the exercise of such right," the assignees of the incorporeal right will take subject to the condition, which may be enforced by the assignees of the surface, Aspden v. Seddon, 1 Ex. D. 496; 46 L. J. Ex. 353.]

Subject-Matter with which a Covenant may run.

As to the subject-matter to which a covenant may be incident, so as to run with it to the assignee: — The principal case shows that covenants will not run with personal property [and see Garton v. Gregory, 3 B. & S. 90; 31 L. J. Q. B. 302, where the covenant related to improvements in the land, but also to new articles to be introduced on to it for the purpose of trade; and further as to reversionary interests in chattels, Mears v. S. W. Rail. Co., 11 C. B. N. S. 850; 31 L. J. C. P. 220; Tancred v. Allgood, 4 H. & N. 438; Lancashire Wayon

Co. v. Fitzhugh, 6 H. & N. 502, 30 L. J. Exch. 231]. In Milnes v. Branch, 5 M. & S. 411, J. B., being seized in fee, conveyed to the defendant and J. J., their heirs and assigns, to the use that J. B., his heirs and assigns, might have a rent out of the premises, and subject thereto to the use of the defendant in fee, and the defendant covenanted with J. B., his heirs, and assigns, to pay J. B., his heirs and assigns, the rent, and to build within a year one or more messuages on the premises for securing the rent. J. B. within a year demised the rent to the plaintiffs for 1000 years. It was held that covenant would not lie for the plaintiffs, either for non-payment of the rent or not building the messuages; and the court, in giving judgment, expressed a clear opinion that a covenant could not run with rent. Accord. per Parke, B., in Randall v. Rigby, 4 M. & W. 135, where the defendant had covenanted to pay a rent charged upon land. "No doubt," said his lordship, "this covenant is collateral or in gross in one sense, that it does not run with the land or rent, for that Milnes v. Branch is an authority." [See Butler v. Archer, 12 Ir. Ch. R. 104; Haywood v. Brunswick Ben. Building Soc., 8 Q. B. D. 403; 51 L. J. Q. B. 73.] In Bally v. Wells, Wilmot's Notes, 341, vide 3 Wils. 25, it was, however, held that a covenant might run with tithes. That was an action brought by George Bally, clerk, rector of Monkton, against James Wells, assignee of one Whitmarsh, to whom the plaintiff had demised all the tithes of the parish of Monkton, for six years, by a lease containing the following covenant: - "And the said James Whitmarsh, for himself, his executors, administrators, and assigns, both covenant and agree, not to let any of the farmers now occupying the estate at Monkton have any part of the tithes aforesaid, without the consent of the said George Bally in writing first had and obtained." James Whitmarsh assigned his interest in the tithes to the defendant, who let several farmers, occupiers, have part of the tithe without the consent of Mr. Bally, who thereupon brought an action of covenant, and after verdict for the plaintiff, it was moved, among other things, in arrest of judgment, that tithes are incorporeal, lying in grant, and therefore that such a covenant cannot run with them. The court, however, gave judgment for the plaintiff. And in The Earl of Egremont v. Keene, 2 Jones (Exchequer, Ireland) 307, a covenant to pay rent reserved on a demise of the tolls of a market was held to run with the tenement, and bind the assignee of the lessee. But see Co. Litt. 44 b., 47 a. In Muskett v. Hill, 5 Bing. N. C. 694, the question whether a covenant could run with an assignable right to search for and take minerals was discussed, but not decided. See E. of Portmore v. Bunn, 1 B. & C. 694. [The same point afterwards arose in Martyn v. Williams, 1 H. & N. S17, in respect of a license to dig, work, and search for china clay during a term; and it was held by the Court of Exchequer that a covenant by the grantee of the license to leave the works in repair at the end of the term ran with the interest of the owner of the fee expectant upon the determination of the term in the incorporeal right to enter and take the clay, and that the assignee of the fee might sue upon it. In this case the court observed that the statute of Henry 8 extends in express terms to incorporeal hereditaments and tenements, and is not confined merely to lands. Accord. Norval v. Pascoe, 34 L. J. Ch. 83, where a similar covenant was held to run with the subject-matter of the grant.

It was once supposed that covenants would not] run with an estate to which the covenantee is only entitled by estoppel. Noke v. Awder, Cro. Eliz. 436; Lyn v. Wyn, O. Bridgman 131; Whitton v. Peacock, 2 Bing. N. C. 411. [But the contrary was maintained in former editions of this work for reasons which were afterwards adopted and acted upon in Cuthbertson v. Irving, 4 H. &. N. 742, post.

Upon this question, before it had been thus decided, Parke, B., in Gouldsworth v. Knights, 11 M. &. W. 337, had expressed an opinion in the affirmative; and there seem [ed] to be no sound reason why the assignee of a reversion should not establish his title by way of estoppel. An estoppel does not necessarily involve a falsehood. On the contrary, facts are ascertained through the medium of estoppel without reference to the question whether really true or false; and it would be sheer fallacy to assume, that a fact established by estoppel has therefore no real existence. For judicial purposes it ought to be dealt with as if it really existed. It is clear that the assignee of a lessor is entitled to some extent to the benefit of estoppel, and it seems difficult to contend, that the law of estoppel, subject of course to all the limitations and exceptions which form part of that branch of the law itself (see an instance of exception in the case of an interest passing, Doe d. Strode v. Seuton, 2 C. M. & R. 728; and in the case of eviction by title paramount, Doe d. Higginbotham v. Barton, 11 A. & E. 307), shall not apply in favor of the assignee, equally in an action of covenant as in an action of ejectment, or of use and occupation. Rennie v. Robinson, 7 Moore 539; Gouldsworth v. Knights, 11 M. & W. 337. The lessee has (in a case of considerable authority) been held estopped from pleading nil habuit in tenementis in an action of covenant at suit of the assignee of the lessor, Palmer v. Ekins, 2 Lord Raym. 1550, and it seems that he ought not in such a case to be allowed to plead any plea which would be satisfied by proof simply that the lessor had no title when he made the lease.

The cases which have been supposed chiefly to countenance a contrary opinion are Noke v. Awder, Cro. Eliz. 436; Whitton v. Peacock, 2 Bing. N. C. 411; Carwick v. Blagrave, 1 B. & B. 531, 4 Moo. 303 [but the decision in Cuthbertson v. Irving, 4 H. &. N. 742, 6 H. & N. 135, 29 L. J. Exch. 485, renders it unnecessary to examine them at length. In that case the action was by the assignee of the lessor against the lessee upon a covenant to repair, made with the lessor and his heirs. The defendant, by one of his pleas, denied the assignment to the plaintiff, and alleged that the lessor had at the time of the demise no reversion, and that no reversion had vested in the plaintiff. Issue was joined upon this plea, and at the trial a special case was stated, by which it appeared that the lessor was without a legal title at the time of making the lease, that the lease did not, in terms, show the contrary, and that the assignment to the plaintiff disclosed the want of title, but contained apt words to convey a reversion in fee. Upon these facts the Court of Exchequer directed that the judgment should be entered for the plaintiff, and stated that in their opinion, "so long as the lessee continues in possession under the lease, the law will not permit him to set up any defence founded on the fact that the lessor nil habuit in tenementis; and, upon the execution of the lease, there is created, in contemplation of law, a reversion in fee simple by estopped in the lessor, which passes by descent to his heir, and by purchase to an assignee or devisee." This judgment was affirmed in the Exchequer Chamber, where reference was made to the discussion contained in this note upon the authorities bearing upon the point.

In order to appreciate the point actually for the first time decided in this case, it is necessary to consider briefly what was the previous state of the authorities upon this question]. In the first place, the proposition [itself] that covenants could not run with an estate to which the covenantee [was] entitled by estoppel only, in terms excluded the case of a covenant in a conveyance effectual at first by estoppel only, but which has subsequently become a valid conveyance in point of interest, in consequence of the acquisition of an estate by the conveying party. In such a case, it is clear that the assignee of the

covenantee, not being entitled "only by estoppel," may sue equally as if the conveyance had from the first transferred an estate in interest. For example, if one having no estate make an ordinary lease by indenture, and subsequently acquire the fee, the lease becomes an estate in interest; and the lessor and his assigns on the one hand, Webb v. Austin, 8 Scott, N. R. 419, and the lessee and his assigns on the other, Sturgeon v. Wingfield, 15 M. & W. 224, may maintain all such actions on the covenants, as if the lessor had had the fee simple at the time of making the lease.

Perhaps, also, the proposition might [have been] correctly limited to cases where it *appear* [ed] upon the pleadings of the assignee himself, that there was no estate with which the covenant [could] run.

The following is an attempt to state the results of the authorities upon this subject, and to distinguish what is established law from what still remains in doubt:—

- 1. As we have already seen, where an estate by estoppel becomes an estate in interest, by the lessor's subsequent acquisition of an estate, the parties and their assignees are in the same position as if the estate had been ab initio an estate in interest. Webb v. Austin, 8 Scott, N. R. 419; Sturgeon v. Wingfield, 15 M. & W. 224. So far as Whitton v. Peacock, 2 Bing. N. C. 411, is an authority to the contrary, it cannot be considered as law. See 2 Wms. Saund., p. 831, ed. 1871. Church v. Dalton, 2 I. C. L. R. 249.
- 2. [It has been decided that] where it appears upon the face of the deed containing the covenant, that the lessor has not the legal estate in the property, an assignment does not transfer the benefit or burthen of the covenant. Thus, where a lease was made by indenture, reciting that the lessor had only an equitable title, it was held that the lessor, and not his assignee, could sue upon the covenants. Pargeter v. Harris, 7 Q. B. 708. That was only an instance of the rule that an instrument makes no estoppel where the truth appears by the same instrument.

[But this doctrine, though recognized in Cuthbertson v. Irving, has been modified if not actually overruled by the cases of Jolly v. Arbuthnot, 28 L. J. Ch. 547 (decided upon the authority of Dancer v. Hastings, 12 J. B. Moo. 34, 4 Bing. 2), and Morton v. Woods, L. R. 3 Q. B. 658 and 4 Q. B. 293: see at p. 303. In Pargeter v. Harris the action was by lessor against lessee upon the covenant to pay rent. The lessor set out an equitable title, and the defence was that the lessor had assigned his reversion after the making of the lease so that the right to sue upon the covenant to pay rent being one that ran with the reversion must be taken to be in the assignee and not in the lessor. It was held that as it appeared on the face of the indenture of lease that the lessor's title was only equitable, it did not create a reversion by estoppel with which the covenant could run, and that the covenant therefore being in gross the lessor and not his assignee could sue upon it.

In Jolly v. Arbuthnot, 28 L. J. Ch. 547, a receiver of an estate had been appointed by a mortgagor and mortgagee by deed under which the mortgagor attorned and became tenant to the receiver, and a power of distress was conferred upon the latter. The mortgagor having become bankrupt, the receiver distrained. The Master of the Rolls held that as the truth appeared by the recitals in the deed, the mortgagor's assignees were not estopped from denying the tenancy, and that the power of distress being a mere license to seize the goods of the mortgagor was a power in gross, and consequently inoperative against his assignees. The decision was reversed by Lord Chelmsford, C., on appeal, on the ground that as the attornment of the mortgagor to the receiver did in fact create the relation of landlord and tenant between them, the power

of distress was not a power in gross, but was annexed to the tenancy so as to be available against the assignees.

The same principle was acted upon in *Morton* v. *Woods*, *ubi sup*. There a mortgagor in possession executed a mortgage to the defendants by deed reciting the previous mortgage, and by a clause in the same instrument he attorned and became tenant to the defendants at a yearly rent. The deed contained no express power of distress. The defendants having distrained for rent, the mortgagor contended that, inasmuch as it appeared on the face of the deed creating the tenancy that he had no legal estate, he was not estopped from setting up that the defendants had no legal reversion so as to give them a right of distress. It was, however, held in the Exchequer Chamber, affirming the decision of the court below, that, the parties having agreed to establish the relation of landlord and tenant between them, the mortgagor was estopped from denying that the defendants had a legal reversion, although the truth appeared upon the face of the deed itself.

From these decisions it would seem to follow that a covenant such as that in Pargeter v. Harris could not now be held to be a covenant in gross, inasmuch as, though it appeared on the face of the deed that the lessor had no legal estate, the creation of a tenancy by the act and agreement of the parties did confer a reversion (whether strictly speaking by estoppel or not) upon the lessors, so as to give them privity of estate against an assignee of the lessee by virtue of which they might have distrained (Jolly v. Arbuthnot), and such an estate being so created would also, it is submitted, be capable of assignment by the lessor, so as to give the assignee an estate by estoppel within the principle of Cuthbertson v. Irving against the lessee. For since that case has decided that an estate by estoppel is one with which covenants may run, and that an assignee of the lessor is not precluded from taking advantage of the estoppel against the lessee, even though the deed under which he claims shows an absence of legal title in his lessor, why in the case supposed should a lessee be allowed to deny against the assignee of the lessor that which he is precluded from denying as against his lessor? It might indeed be argued that as in those cases where the truth appears by the deed creating the estoppel (if it can be strictly so called) the parties are not precluded from denying anything which appears upon the deed itself, it is open for them to contend that, though an estate to which certain legal interests may attach has been created by their own agreement, it is not nevertheless one with which covenants may run since the want of the legal estate is apparent from the deed itself, and cannot be assumed against the lessee as in cases of pure estoppel to have been in the lessor. But since the benefit and burthen of covenants attach not by quantum but by privity of estate, it would seem to follow, in the present state of the authorities, that an assignment may transfer the benefit or burden of covenants, even though it appears on the face of the deed containing the covenant that the lessor had not the legal estate.

3. It was once thought that] where it appeared by the statement in pleading of the assignee himself who sought to enforce the covenant, that the covenantee had no estate; even though it also appeared that there was an estoppel which might have been relied upon, the assignee would fail on his own showing (Noke v. Awder, Cro. Eliz. 436); for in such a case, the party entitled to the benefit of the estoppel contradicts instead of relying upon it. (See Ludlow v. Barber, 1 T. R. 95, per Buller, J.) [But this opinion, which is scarcely consistent with the decision in Cuthbertson v. Irving, is rendered of slight importance by the recent changes in the system of pleading, introduced by 36 & 37 Vict. c. 66 (the Supreme Court of Judicature Act).]

4. Where the assignee states as part of his title some particular estate to have

been in the lessor at the time of the lease, and it does not appear that the lessee is estopped by the lease from denying that particular estate as against the lessor, he may deny it in the action at suit of the assignee. Carvick v. Blagrave, 1 B. & B. 531; 4 Moore, 303, S. C. [Weld v. Baxter, 11 Exch. 816, S. C., affirmed in error, 1 H. & N. 568.]

- 5. In an action by lessor against assignee of lessee, it is unnecessary for the lessor to allege his title; and, if it neither appears by the lease, as in Earl of Portmore v. Bunn, 1 B. & C. 694, nor by the lessee's pleadings, that he had no title [as to which, however, see supra], it is not competent for the assignee to raise the question whether he had an estate in interest, or only by estoppel. Taylor v. Needham, 2 Taunt. 278; Cooper v. Blandy, 1 Bing. N. C. 45; Warburton v. Ivie, 1 Jones (Exchequer, Ireland), 313.
- 6. If a lease be made by indenture, in such a form as to create between the lessor and lessee an estoppel to deny that the lessor had a reversion, and the lessor conveys all his interest [it has been decided, as we have seen, that the assignee can sue the lessee or his assignee for breaches of covenant in respect of which the lessor might have sued, had there been no assignment, Cuthbertson v. Irving, ubi sup.].

In the case of a lease for years, made by a tenant for life, or in tail, who dies before the end of the term, an assignee who has become so during the life of the landlord may sue upon the covenants; but not one who has become so after the lease has become actually void by the death of the landlord. Andrews v. Pearce, 1 N. R. 158; Williams v. Burrell, 1 C. B. 402. These cases are referred to only to prevent misapprehension. They do not affect the present question, because in them an interest passed by the lease, and there was no estate, either in interest or by estoppel, at the time of assignment.

But [though it has been decided] that the assignee of a reversion established by the medium of an estoppel may sue upon the covenants in the lease, it must be conceded that the question, to what extent the parties are estopped by the execution of a lease, is one of much nicety, and only to be answered in each case by reference to the terms of the instrument.

Akin to this part of the subject is the question revived by the decision of the Court of Queen's Bench in *Pollock* v. *Stacey*, 9 Q. B. 1033, that the relation of landlord and tenant, properly so called, can be created between assignor and assignee upon a conveyance of the entire residue of a term, there being no reversion either in fact or by estoppel; a decision contrary to the opinion expressed by the Court of Exchequer in *Barrett* v. *Rolph*, 14 M. & W. 348. See also *Wollaston* v. *Hakewill*, 3 Sc. N. R. 593; 3 M. & G. 297, S. C.

The same question had previously caused a difference of opinion on the Irish bench, the Court of Queen's Bench in that part of the kingdom having held that Pluck v. Digges, 5 Bligh, N. S. 41, had authoritatively settled the question in the negative, Lessee of Fawcett v. Hall, Alc. & N. 248; the Court of Exchequer having been of a contrary opinion. Lessee of Walsh v. Feely, 1 Jones, 413. The latter court, however, "after reviewing all the cases upon the subject, have since concurred with the Queen's Bench," 2 Furlong on Landlord and Tenant, 1121, referring to Lessee of Porter v. French [9 Irish Law Rep. 514]; so that both those courts are now of accord with the Court of Exchequer in England. [And the distinction itself has been abolished in Ireland by 23 & 24 Vict. c. 154. s. 3, which enacts: "That the relation of landlord and tenant shall be deemed to be founded in the express or implied contract of the parties, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases where there shall be an agreement by one party to hold land from or under another in consideration of any rent."]

Without professing to discuss the question here, it may be observed that it was not fully argued in either Barrett v. Rolph, or Pollock v. Stacey, and that it cannot be considered as settled by the refusal of the rule in the latter case. It will require for that purpose to begin the inquiry earlier than the Nisi Prius ruling in Poultney v. Holmes, 1 Strange, 405, acted upon by the Court of Queen's Bench. The distinction between conveyances by way of subinfeudation and by way of assignment, of estates in fee (see Wright's Tenures, 156), does not appear to have existed in the case of lesser estates, or to have been acted upon after the statute of Quia Emptores for any purpose relating to lands of socage tenure, until it was brought back to light in Poultney v. Holmes, to meet the supposed hardship of a particular case. The authorities collected in the note to The King v. Wilson, 5 Man. & R. 157, as tending to establish the contrary, seem, even in the opinion of the very learned annotator (see page 162), to fail of that object. Assuming, for the sake of argument, the position in Poultney v. Holmes to be correct, in what relation do the supposed under-tenant of all the lessee's interest and the superior landlord stand? May the landlord treat the supposed undertenant as his tenant, by reason of his having acquired the entire residue of the term? It will hardly be contended that he cannot. See Palmer v. Edwards. 1 Doug. 187, n. If he can, then the supposed under-tenant may hold one and the same land immediately of two several lords, which cannot be, according to Littleton, § 231, and Lord Coke's Commentary, Co. Litt. 152, b. Perhaps the true distinction may be, between cases where it appears judicially that the entire interest has been conveyed, and cases where, by reason of estoppel, it does not so appear. In Baker v. Gostling, 1 Bing. N. C. 19, relied on in Pollock v. Stacey as confirming Poultney v. Holmes, there appears to have been a reversion by estoppel, and where there is such an estoppel, it is not necessary, as between the parties estopped, to advert to the question, whether in fact the instrument operates as an assignment or not. In Cremen v. Hawkes, 2 Jones & Latouche, 674, Lord Chancellor Sugden considered that there was no right to sue in equity upon such an instrument, containing express powers of distress and entry, which might be enforced at law. See Doe d. Freeman v. Bateman, 2 B. & A. 168. And the remedy for actual use and occupation, though under an invalid assignment, is of course not touched by the above controversy. See further Litt. §§ 214, 215, 216, 231, 232, and the Commentary; the notes to 2 Wms. Saunders, p. 834, Ed. 1871, 418, c. d, e, et seg., and a note in Alcock & Napier, 258, containing an opinion of Mr. Justice Burton, the reasoning in which goes near, if not the whole way, to conclude the discussion. [See also Beardmen v. Wilson, L. R. 4 C. P. 57, where Pollock v. Stacey is explained.]

In considering whether or not a covenant will run with land, that is whether it can be enforced by or against one not a party to the covenant, but whose only right or liability depends upon his ownership of the land which it concerns, by descent or grant from one of the original parties, two principal questions arise,—

1. Whether the parties have sufficient mutual relation to the land which the covenant concerns, or, as it is commonly expressed in the cases, whether there is a privity of estate, which is considered necessary when there is no privity of contract. It will be seen that the necessary relation is something different from the ancient privity of estate, and that in many cases the expression is used in a modern sense.

2. Whether the subject-matter of the covenant is such that it will run with the land, or such that it will be enforced only between the parties to it and their personal representatives.

The historical development of the subject was discussed in a learned opinion in Norcross v. James, 140 Mass. 188.

It seems to be well settled, in this country at least, that covenants will run with incorporeal, as well as with corporeal hereditaments: Willard v. Tillman, 2 Hill 274; Van Rensselaer v. Read, 26 N. Y. 558; Fitch v. Johnson, 104 Ill. 111; Hazlett v. Sinclair, 76 Ind. 488; Howard Co. v. Water Lot Co., 53 Ga. 689; St. L., I. M. & S. R'y v. O'Baugh, 5 S. W. Rep. 711 (Arkansas); Scott v. Lunt, 7 Pet. 596.

On the other hand, in Wheelock v. Thayer, 16 Pick. 68, the court held that a covenant would not run with a grant of a privilege of drawing water from a pond, saying, — "This covenant could not run with the land, for no land was granted, and to make a covenant run with the land it is not sufficient that it is of and concerning land." Some doubt was expressed in the opinion, and it was shown that there was another and different ground for the decision "if this ground of defence could not be sustained."

Lessor and lessee. — As between lessor and lessee, by the common law the covenants of the lease would run with the land in favor of, or against, an assignee of the term, but would not run with the reversion. To remedy this, the statute 32 Henry VIII. c. 34 was passed, which gave the assignee of the reversion the same right to sue on the covenants of the lease which the lessor had. Though general in its terms, this act, as was said in the leading case, did not extend to mere personal and collateral covenants: it only included those which touch and concern the land demised. It is in force in most, if not all of the States of this country, either by adoption or as part of the common law independent of it. Baldwin v. Walker, 21 Conn. 168; Masury v. Southworth, 9 Ohio St. 340. Independent of the statute, it seems clear that debt would lie at the common law by the assignee of the lessor to recover

rent, in virtue of the privity of estate. Patten v. Deshon, 1 Gray 325.

It has been held that the statute applies only to assignments of the reversion, and does not apply to an assignment of the lease only: Allen v. Wooley, 1 Blackf. 148. But the better opinion seems to be that an assignment of the lease is merely an assignment of the rent with which a covenant will run independently of the statute: Demarest v. Willard, 8 Conn. 206; Kendall v. Carland, 5 Cush. 74. See also Van Rensselaer v. Read, 26 N. Y. 558; Patten v. Deshon, 1 Gray 325.

In Willard v. Tillman, 2 Hill 274, it was considered as settled that the assignee of rent could sue for it, though the court professed to see no reason for it, and said, "There is no privity of estate, and, so far as I can see, no privity of contract, between him and the lessee."

In questions between the owner of a term and the owner of the reversion or of the lease, there is sufficient privity of estate in all cases, and both the benefit and burden of the covenants will run with the land, and the principal question is whether the covenant is one which the law will allow to run as sufficiently inherent in the land. It may be observed that the question of whether it is necessary to covenant for "assigns," as to anything not in esse at the time of the covenant, discussed in the first and second resolutions of the leading case, has generally been passed over lightly in this country, and the use of the word "assigns" considered of little importance if an intention that the covenant run can be gathered from the whole instrument. Masury v. Southworth, 9 Ohio St. 340; Bradford Oil Co. v. Blair, 113 Penn. St. 83; Bailey v. Richardson, 66 Cal. 416; Dorsey v. St. L., A., & T. H. R. R., 58 Ill. 65; but the rule was applied in Hartung v. Witte, 59 Wis. 285; and see Newbury Petroleum Co. v. Weare, 44 Ohio St. 604.

Covenants of title. — The original and ancient warranty was a real covenant, the remedy on which was by voucher, or writ of warrantia chartæ, and which bound the covenantor to replace the lands in case of the eviction of the grantee, by others of equal value. The modern covenants of title, which are often spoken of as personal covenants, because the action on them is a personal action, have taken the place of this, and, as they usually appear, are (1) of seisin; (2) of right to convey; (3) against incumbrances; (4) to warrant and defend.

All of these are for the benefit of the land, and, as loss suffered by breach of any usually, if not always, falls on the owner of the land, there would seem much practical advantage if the owner of the land who suffered loss by a breach of any of them could have his action against the covenantor, but as the covenants of seisin, of good right to convey (which is much the same thing), and against incumbrances are necessarily broken, if at all, when made, the technical rule that a covenant, after breach, is a mere chose in action, incapable of running with land, is applied, and they are held to be covenants in presenti, and enforceable only by the original covenantee and his personal representatives: Mitchell v. Warner, 5 Conn. 521; Bartholomew v. Candee, 14 Pick. 167; Clark v. Swift, 3 Met. 390; Whitney v. Dinsmore, 6 Cush. 124; Ladd v. Noyes, 137 Mass. 151; Montgomery v. Reed, 69 Me. 510; Blondeau v. Sheridan, 81 Mo. 545 (but see Allen v. Kennedy, 91 Mo. 324, infra); Davenport v. Davenport, 52 Mich. 587; Fuller v. Jillette, 9 Biss. 296; Real v. Hollister, 20 Neb. 112; Swasey v. Brooks, 30 Vt. 692 (but see Cole v. Kimball, 52 Vt. 639).

In some of the States, covenants against incumbrances are made to run with the land by statute. See Stevens v. McNamara, 36 Me. 176; Carter v. Peak, 138 Mass. 439.

On the other hand, in some of the States it is held that covenants of seisin and against incumbrances are covenants of indemnity, and although broken when made, so that there might be nominal damages obtained by the original grantee, that "such action and recovery would not defeat or prevent another action by that grantee or by the grantee of that grantee, however remote, when and after either had been required to discharge the incumbrance in order to protect his title, - the breach as to the amount thus required to be paid would not occur until the payment, and then in favor of the party holding the title and making the payment." Knadler v. Sharp, 36 Iowa 232; Magwire v. Riggin, 44 Mo. 512; Allen v. Kennedy, 91 Mo. 324 (but see Blondeau v. Sheridan, 81 Mo. 545); Dehority v. Wright, 101 Ind. 382; Cole v. Kimball, 52 Vt. 639; McCrady v. Brisbane, 1 Nott & M. 104; Martin v. Baker, 5 Blackf. 232; Devore v. Sunderland, 17 Ohio 52; Post v. Campau, 42 Mich. 90 (but see Davenport v. Davenport, 52 Mich. 587).

But, however it may be with covenants of seisin and

against incumbrances, the covenant of warranty — to warrant and defend — is always regarded as a prospective covenant, the benefit of which will run with the land to any successive grantees, and of which there will be no breach until eviction. White v. Whitney, 3 Met. 81; Wheeler v. Sohier, 3 Cush. 219; Whitney v. Dinsmore, 6 Cush. 124; Booth v. Starr, 1 Conn. 244; Mitchell v. Warner, 5 Conn. 497; Jeter v. Glenn, 9 Rich. 374; Kelly v. Dutch Church, 2 Hill 105; Paul v. Witman, 3 W. & S. 407; Flaniken v. Neal, 67 Tex. 629; Real v. Hollister, 20 Neb. 112; Wilder v. Davenport, 58 Vt. 642; Montgomery v. Reed, 69 Me. 510; Schwallback v. C., M. & St. P. Ry., 69 Wis. 292; Marbury v. Thornton, 1 S. E. Rep. 909 (Va.).

For an eviction which will constitute a breach of the covenant, it is not necessary that there should be actual dispossession of the plaintiff, but it is sufficient if he pays to avoid it: Chandler v. Brown, 59 N. H. 370; Lane v. Fury, 31 Ohio St. 574; Furnas v. Durgin, 119 Mass. 500; Ward v. Ashbrook, 78 Mo. 515; Hall v. Bray, 51 Mo. 288; Schelle & Quest Lumber Co. v. Barlow, 34 Fed. Rep. 853; Booth v. Starr, 1 Conn. 244. But when the grantee surrenders to the paramount title, he must show that it was a valid and subsisting one, capable of being enforced, and was actually asserted, or he can recover only nominal damages: Morgan v. Railroad Co., 63 Mo. 129.

There has been held to be a constructive eviction if the covenantor never gets actual possession of the land: Blondeau v. Sheridan, 81 Mo. 545.

This covenant of warranty binds the original grantor and his personal representatives to the owner of the land, and any owner, during whose possession a breach occurs, can sue any or all previous covenantors, even though the deed under which he himself claims has no covenant of warranty: Suydam v. Jones, 10 Wend. 180; Chase v. Weston, 12 N. H. 413; Hunt v. Orwig, 17 B. Mon. 73; Claunch v. Allen, 12 Ala. 159; Lawrence v. Senter, 4 Sneed 52; Le Ray de Chaumont v. Forsythe, 2 Penn. 507; Booth v. Starr, 1 Conn. 244; or is merely a sheriff's deed: Flaniken v. Neal, 67 Tex. 629; McCrady v. Brisbane, 1 Nott & M. 104; White v. Whitney, 3 Met. 81; though of course there can be but one satisfaction for the breach; Wilson v. Taylor, 9 Ohio St. 595.

It was said in Norcross v. James, 140 Mass. 188, in speaking of covenants of title, "In order that an assignee should be so

far identified in law with the original covenantee, he must have the same estate, that is, the same status, or inheritance, and thus the same persona quoad the contract. The privity of estate which is thus required is privity of estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the ancient books."

It seems that there must be between covenantor and covenantee the relation of grantor and grantee, which is all that there is between the grantee and his assignee. It is not thought that a covenant of warranty made by a stranger to the land would run with it, and perhaps the relation necessary to exist is that which would have constituted privity of estate at common law before the statute of Quia Emptores, although the rent or services reserved, which were, perhaps, an incident of the old privity, are not now usual. On the authority of Pakenham's Case, sometimes called the Prior's Case, stated in the text, the English editor lays it down broadly that the covenantor may be a stranger to the land, but that case stands by itself, and it may well be doubted if, at the present day, a covenant to warrant the title, or to keep buildings in repair (for instance), made by a stranger to the land, would be held to run. It is possible that some explanation of that case might be found in the religious nature of the service and the connection of the convent and the manor. If it should be followed to the extent suggested by the English editor, it would be a startling exception to the otherwise universal rule that there must some land or interest in land pass in connection with the covenant. See Keppel v. Bailey, 2 Myl. & K. 517, 539. The doctrine of the Prior's Case has, however, been referred to without disapproval: Dickinson v. Hoomes, 8 Gratt. 353, 403; Norcross v. James, 140 Mass. 188, 191, supra; Lydick v. B. & O. R. R., 17 W. Va. 427, 436. See Norman v. Wells, 17 Wend. 136, 154.

At common law, in the absence of express covenants, the word "give" implied a warranty for the life of the grantor: Frost v. Raymond, 2 Caines 188; Kent v. Welch, 7 Johns. 258; Crouch v. Fowle, 9 N. H. 219; but this technical rule will not be extended to an instrument which purports to be and is but the execution of a power given by statute, and in which the grantor neither assumes to have nor to convey any estate, title, or interest of his own. Dow v. Lewis, 4 Gray 468.

Clearly only the *benefit* of covenants for title runs with the land, and they are enforceable only against the covenantor and his personal representatives.

Quasi easements. — Another class of covenants, the benefit or burden of which will run with the land for or against the grantee of both covenantor and covenantee, is illustrated by the case of Morse v. Aldrich, 19 Pick. 449; S. C., 1 Met. 544. The ancestor of the defendants conveyed to plaintiff's grantor land, with the privilege of using and improving land and a mill pond west of said land, and full liberty of ingress, egress, and regress to and from any part of the said described land and water, to dig out and carry away the whole or any part of the Afterward, defendant's ancestor covenanted with the plaintiff, who then held the land, that he would draw off the water in said pond certain days in each year. This last covenant was held to run with the land to the defendants, as heirs, thus making the land subject to the burden of the covenant. The court say, "To create a covenant which will run with the land, it is necessary that there should be a privity of estate between the covenantor and the covenantee, Spencer's Case, 5 Co. 16; Cole's Case, Salk. 196; 3 Wils. 29; Webb v. Russell, 3 T. R. 402; Keppel v. Bailey, 2 Myl. & K. 517; Vyvyan v. Arthur, 1 B. & C. 410. In these cases, and in most of the cases on the same subject, the covenants were between lessors and lessees; but the same privity exists between the grantor and grantee, when a grant is made of any subordinate interest in land; the reversion or residue of the estate being reserved by the grantor, all covenants in support of the grant or in relation to the beneficial enjoyment of it are real covenants and will bind the assignee."

So in Fitch v. Johnson, 104 Ill. 111, a company owning a dam and water power sold plaintiff's grantor a flouring mill and two thousand five hundred inches of water, and covenanted to keep the dam in repair, and afterwards conveyed the dam and land on which it was built to defendant, and it was held that the benefit of the covenant passed with the land of the covenantee, and the burden with that of the covenantor.

In Bronson v. Coffin, 108 Mass. 175; S. C., 118 Mass. 156, Coffin conveyed land to a railroad, and in his deed covenanted for himself, his heirs, and assigns, that he would "make and maintain a sufficient fence through the whole length of that

part of the railroad which runs through my farm; this covenant of maintaining the fence to be perpetual and obligatory upon me and all persons who shall become owners of the land on each side of said railroad," and this was held to be a covenant running with land to defendants who took as his heirs. The words, though sounding only in covenant, were considered to operate as a grant of a quasi easement. Hazlett v. Sinclair, 76 Ind. 488, is to the same effect. So too of a covenant that a way shall be opened as there staked out, Thomas v. Poole, 7 Gray 83; or that land of the grantor shall not be built on, but kept as a public park, Watertown v. Cowen, 4 Paige 510.

In St. L., I. M. & S. R'y v. O'Baugh, 5 S. W. Rep. 711 (Arkansas), defendant made an agreement with plaintiff's grantor by which, in consideration of a grant of a right of way, the defendant covenanted to build its tracks above the overflow of the river, and this covenant was held to run with the land in favor of the plaintiff. So too of an agreement to build and maintain a switch to a mill on the land for the use of the mill. Lydick v. B. & O. R. R., 17 W. Va. 427.

In Gilmer v. M. & M. R. R., 79 Ala. 569, the plaintiff sold land to a railroad, the grantor of the defendant, which covenanted to erect a flag station on grantor's premises; not to sell liquor on them; and that grantor might cultivate parts not used by the railroad. These covenants were held to run with the land, and that there was sufficient privity if the covenantee retained or acquired an easement appurtenant to the land, for the benefit of other land owned by him; Georgia So. R. R. v. Reeves, 64 Ga. 492.

In Ky. Central R. R. v. Kenny, 82 Ky. 154, the covenant of the grantee to fence was held to run with other land retained by the grantor for its benefit against an assignee of the grantee; Poage v. W., St. L. & P. R. R., 24 Mo. App. 199; Countryman v. Deck, 13 Abb. N. Cas. 110; Hartung v. Witte, 59 Wis. 285; Dorsey v. St. L., A. & T. H. R. R., 58 Ill. 65; Burbank v. Pillsbury, 48 N. H. 475.

See also Maxon v. Lane, 102 Ind. 364; Howard Co. v. Water Lot Co., 53 Ga. 689; Wooliscroft v. Norton, 15 Wis. 198; Mayor v. White, 62 Md. 362.

In the same category are cases illustrated by Savage v. Mason, 3 Cush. 500, in which owners of a tract of land made an indenture of partition, and in the same instrument covenanted

mutually that the owner of any lot might build his wall onehalf on each side of the boundary line, and that when the owner of the adjacent lot should build, if he used the wall, he should pay for one-half of it. One of the lots came by mesne conveyances to a person who built on it, placing the centre of his wall on the boundary line, after which it was conveyed to the plaintiffs. The adjoining lot came by mesne conveyances to the defendant, who built, using the party wall, and he was sued on the covenant for half its value. The court say: "The liability to perform, and the right to take advantage of this covenant, both pass to the heir or assignee of the land to which the covenant is attached. This covenant can by no means be considered as merely personal, or collateral, and detached from the land; there was a privity of estate between the covenanting parties in the land to which the covenant was annexed. The covenant is in terms between the parties and their respective heirs and assigns; it has direct and immediate reference to the land; it relates to the mode of occupying and enjoying the land; it is beneficial to the owner as owner, and to no other person; it is in truth inherent in and attached to the land, and necessarily goes with the land into the hands of the heir or assignee." See Weld v. Nichols, 17 Pick. 538. In later cases in Massachusetts the right to recover is based on the theory that by the agreement a property in the wall passed to the owner of the land who built it and to his assigns until it was used, when he had the right to repayment. Maine v. Cumston, 98 Mass. 317; Standish v. Lawrence, 111 Mass. 111; Richardson v. Tobey, 121 Mass. 457. See Joy v. Boston Penny Sav. Bank, 115 Mass. 60.

In Bronson v. Coffin, supra, it was said of Savage v. Mason: "The only privity of estate between the parties consisted in the mutual right and obligation created by the same instrument which contained the covenant sued on, to have the division wall stand half on each lot, and to contribute to the expense thereof," but this involves a grant of an interest in the nature of an easement in the land of each other.

To the same effect are Conduitt v. Ross, 102 Ind. 166 (distinguishing Bloch v. Isham, 28 Ind. 37); Weill v. Baldwin, 64 Cal. 476; Platt v. Eggleston, 20 Ohio St. 414; Thomson v. Curtis, 28 Iowa 229. In all of these cases it was considered that the covenant acted as a grant of an interest in the nature

of an easement in the adjacent lot, which constituted the necessary privity of estate.

A different view prevails in New York, where it is held that no interest in the land passes, and that consequently there is no privity of estate, and that the covenant is personal and will not run: Cole v. Hughes, 54 N. Y. 444; Scott v. McMillan, 76 N. Y. 141; Hart v. Lyon, 90 N. Y. 663. In Cole v. Hughes it was said, "He received no interest in land, and granted none." The doctrine seems firmly established there, but it is difficult to reconcile it with the general line of the decisions, or with some of the other cases in the same State.

In Norfleet v. Cromwell, 64 N. C. 1; S. C., 70 N. C. 634, the defendant's grantor, in consideration of the right to drain his land into plaintiff's canal, his land not being on the canal but separated from it by a narrow strip, covenanted to pay a proportion of the expense of keeping the canal in repair. It was held that the defendant took an easement by the covenant as by grant in the canal, and that the burden of the covenant to pay for maintaining the canal ran to him with his land. The court say (64 N. C. 12): "We think it clear that one effect of the contract was to grant to each of the parties an easement in fee, appurtenant to their several described pieces of land, and passing, both as a benefit and as a burden, to subsequent assignees. The lands of each became both servient and dominant to the lands of the others for certain purposes. . . . Words of covenant may be equivalent to a grant if such be the clear intention."

In 70 N. C. 634 it was decided that, although the canal did not touch the land, it did directly concern it.

In the cases of this class, a burden to do or forbear from doing some act directly concerning or touching the land is imposed on land of the covenantor for the benefit of land of the covenantee, and he who takes the land of the covenantor takes it cum onere, and he who takes that of the covenantee takes it with the benefit of the covenant. In other words, an easement, or something in the nature of an easement, is created, the benefit of which will run with the dominant estate of the covenantee, or the burden with the servient estate of the covenantor, or both.

It has been urged with much force and learning that there must always be a privity of estate between the covenantor and covenantee for the *burden* of a covenant to run with the land,

but it is doubtful if this distinction can be sustained from the cases. Certainly it is not necessary in the strict sense of the term. In Norcross v. James, 140 Mass. 188, it was said: "When it is said that in this class of cases there must be a privity of estate between the covenantor and the covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or quasi easement, or must be in aid of such a grant (Bronson v. Coffin, supra); which is generally true, although, as has been shown, not invariably (Pakenham's Case, Y. B. 42 Ed. III. 3, pl. 14); and although not quite reconcilable with all the old cases except by somewhat hypothetical historical explanation. But the expression 'privity of estate' in this sense is of modern use, and has been carried over from the cases of warranty, where it was used with a wholly different meaning."

In Bronson v. Coffin, 108 Mass. 175, supra, it was said: "An interest in the nature of an easement in the land which the covenant purports to bind, whether already existing or created by the very deed which contains the covenant, constitutes a sufficient privity of estate to make the burden of a covenant to do certain acts upon that land, for the support and protection of that interest and the beneficial use and enjoyment of the land granted, run with the land charged. And an obligation, duly expressed, that the structures upon one parcel of land shall forever be of a certain character for the benefit of an adjoining parcel is equally a charge upon the first parcel, whether the obligation is affirmative or merely restrictive, and whether the affirmative acts necessary to carry the obligation into effect are to be done by the owner of the one or the owner of the other." In the same case, 118 Mass. 156, 163, the expression "the easement which is the medium which creates the privity of estate" is used.

In Van Rensselaer v. Hays, 19 N. Y. 68, there was a conveyance in fee by an indenture of certain land "yielding and paying therefor yearly" to the grantor and his heirs or assigns certain rent, and an express covenant to pay the rent. The plaintiff was the devisee of the rent, and the defendant took by assignment from the grantee. It was held:—

1. That the rent was a rent-charge: see Ingersoll v. Sergeant, 1 Whart. 337.

- 2. That the benefit of the covenant to pay it ran to the plaintiff as devisee of an incorporeal hereditament, if not at common law, still by an old statute.
- 3. That the burden of the covenant ran with the land to the defendant, although it was held that there was no reversion in the covenantee. On this point the court say: "There is a certain privity between the grantor and grantee of the land. It is not the privity arising upon tenure, for there is no fiction of fealty annexed. It is, however, the same sort of privity which enables the grantee of a purchaser to maintain an action upon the covenants of title given to his vendor; and it is, moreover, a privity of the same nature with that which obtains between the grantor and grantee of terms for life and years. . . . It is not easy to see how, upon any kind of reasoning, the presence or absence of a reversion can affect the relations between the party primarily chargeable upon the covenants and another to whom he conveys the land, charged with the performance of these covenants. It is obvious that the fiction of feudal tenure has nothing to do with the case."

In Van Rensselaer v. Read, 26 N. Y. 558, it was held, under the same facts as in Van Rensselaer v. Hays, that the right to enforce the covenant to pay rent ran with the devise of the rent, independent of any statute. The court say (p. 574): "There is such a privity of estate between the assignee of the rent, who is entitled to demand and receive it, and the owner and occupant of the land, who is bound by the covenant to pay it, as entitles the former to maintain an action upon the covenant for its collection." In this case privity of estate is considered as something entirely different from tenure. "Clearly the presence of tenure is not necessary to enable covenants, either as to their benefits or their burdens, to run with land."

Whether the instruments in these cases were leases in fee, establishing the relation of lessor and lessee, or conveyances in fee, with a rent reserved, has been fully discussed in Tyler v. Heidorn, 46 Barb. 439.

In all cases it is believed that there must pass between the covenantor and covenantee, at or about the time of the covenant, land or some interest in land, and this is what is meant by saying there must be some privity of estate. Thus in Savage v. Mason, the covenant was in a conveyance in partition

and land passed at the time of the covenant, while in Cole v. Hughes it was held that no interest in land passed, and consequently the covenant could not run. Again, in such cases as Conduitt v. Ross, and Norfleet v. Cromwell, which seem directly opposed to that last referred to, it was considered by the court that some interest in land did pass, the words, though sounding in covenant, operating as a grant of an easement. Whenever the court has considered that no land or interest in land passed, it has held that no covenant could run. In Hurd v. Curtis, 19 Pick. 459, several mill-owners on the same stream covenanted that their mills should all have wheels of the same construction and power, and it was held that there was no privity and the covenants could not run. Had the court taken the view of Norfleet v. Cromwell, that by the covenants each got an interest in the nature of an easement in the estate of others, the decision might well have been different. In Morse v. Aldrich, supra, the estate in land passed before the covenant declared on was made, and the conveyance was not between the same parties as the covenant. The only way in which the case can be sustained is by the fact that the words, though sounding in covenant, carried with them a grant of an interest in the estate of the covenantor. On the other hand, in Hurd v. Curtis, supra, in the same volume of reports, and decided by the same judge, it would seem that the mutual covenants of the different owners might well have been considered to carry with them a grant of an interest, each in the estates of the others, and so constitute the necessary privity. It is difficult to reconcile this case with Savage v. Mason, supra, unless on the ground that in the latter land was supposed to pass by the deed in partition which contained the covenant; but if we accept this, it leaves Morse v. Aldrich, in which no land passed, to be explained. It would seem that the decision in Hurd v. Curtis is not in harmony with the current of modern cases.

In Cole v. Hughes, 54 N. Y. 444, supra, which was an agreement for party walls between owners of adjacent lots, the court say, "He received no interest in land and granted none," and so held there was no privity of estate. See Richardson v. Tobey, 121 Mass. 457; Plymouth v. Carver, 16 Pick. 183.

In Conduitt v. Ross, 102 Ind. 166, supra, it was said, "Where an instrument conveys or grants an interest or right in land, and at the same time contains a covenant, in which a right at-

tached to the estate or interest granted is reserved, or when the grantee covenants that he will do some act on the estate or interest granted, which will be beneficial to the grantor, either as respects his remaining interest in the lands out of which an interest is granted, or lands adjacent thereto, such covenant is one which may become annexed to and run with the land, and bind its owners successively. When such grant is made, and contains a covenant so expressed as to show that it was reasonably the intent that it should be continuing, it will be construed as a covenant running with the land. A covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed."

In Harsha v. Reid, 45 N. Y. 415, the owner of land covenanted with a stranger to it that no mill should be erected on it. The court say, "It was a personal covenant, and binding only the covenantors and their personal representatives. It granted no interest in the premises, and created no charge thereon. The covenantees did not derive title from the covenantors, but the covenant was an independent and personal contract, made upon and for a money consideration, in no way connected with the title."

In Wheeler v. Schad, 7 Nev. 204, the plaintiff conveyed to A. part of a mill site and water privilege, and six days afterwards they agreed to build a dam, and share the expense of making and repairing it. The dam was built, and A. sold to the defendant, who was sued for his share of the expense of repairs, and it was held that, as the covenant was not made at the time of the grant, there was no sufficient privity of estate, and it would not run. This resembles Hurd v. Curtis, supra.

There must be some nexus to bind the covenantor and covenantee together if the covenant is to run, and this can be found in the relation created by the grant of land or some interest in land at the time of the covenant, which, as was seen before, was the same thing that was necessary in the case of covenants of title. This is necessary for the benefit of a covenant to run, and nothing more seems necessary for the burden of it.

The English editor expresses great doubt whether covenants entered into by the owners of land in any case run with the lands, so as to bind the assignee of the covenantor. It is clearly settled in this country that they will, and the argument that

"an inconvenience which would be the result of holding them to do so is that the assignee would frequently find himself liable to contracts of the very existence of which he was ignorant, and which, perhaps, would have deterred him from accepting a conveyance of the land, if he had known of them," has no application under the system of registration in force here.

Equitable relief. — Equity will enforce agreements made by the owner of land for the benefit of other land, when in good conscience they should be complied with, against subsequent grantees of the land with notice, express or constructive, whether they appear as stipulations, restrictions, reservations, conditions, or covenants, and independent of the question whether they would at law be treated as covenants running with the land. But, as was said in Norcross v. James, 140 Mass. 188, "equity will no more enforce every restriction that can be devised, than the common law will recognize, as creating an easement, every grant purporting to limit the use of land in favor of other land," and the same general principles apply. So in that case a covenant by the grantor not to open or work quarries on other land retained by him, though for the benefit of the granted premises, was not enforced in equity, as creating "an easement of monopoly." So also in Brewer v. Marshall, 3 C. E. Green 337; S. C., 4 Id. 537; but see Hodge v. Sloan, 107 N. Y. 244, infra. See also Jewell v. Lee, 14 Allen 145; Skinner v. Shepard, 130 Mass. 180; Miller v. Noonan, 12 Mo. App. 370; S. C., 83 Mo. 343; Hammond v. P. R. & A. R. R., 15 S. C. 10; S. C., 16 S. C. 567.

If the restriction or reservation creates an easement or servitude in the nature of an easement, and if this easement is created for the benefit of an adjoining lot, of which the grantor in the deed remains the owner, and not for the personal convenience of the grantor, and is intended to be annexed to such lot, it will be appurtenant to it and will pass to a grantee of it. Whether or not it is so must be determined by the instrument creating it, aided, if necessary, by the situation of the property and the surrounding circumstances. Peck v. Conway, 119 Mass. 546.

On the other hand, equity has enforced a covenant of adjoining owners against the grantee of one of them not to use land for building purposes, Trustees v. Lynch, 70 N. Y. 440; S. C., 87 N. Y. 311; a reservation that no building shall be erected on

land conveyed, Peck v. Conway, 119 Mass. 546; see Whitney v. Union Railway Co., 11 Gray 359; Parker v. Nightingale, 6 Allen 341; Trustees of Watertown v. Cowen, 4 Paige 510; Barrow v. Richard, 8 Paige 351; Clark v. Martin, 49 Penn. St. 289; not to sell land without a restriction as to building, Kirkpatrick v. Peshine, 24 N. J. Eq. 206; to leave adjoining strip open as a passageway, Brew v. Van Deman, 6 Heisk. 433; that houses should be set back from the street, Winfield v. Henning, 21 N. J. Eq. 188; that grantee should not sell sand off the parcel of a larger lot sold him, Hodge v. Sloan, 107 N. Y. 244; of a railroad, grantee of a right of way, to build a switch, Lydick v. B. & O. R. R., 17 W. Va. 427. See also Hagar v. Buck, 44 Vt. 285; Greene v. Creighton, 7 R. I. 1.

As to what restrictions will be enforced in equity as for the benefit of other land, or as part of a general scheme, see Linzee v. Mixer, 101 Mass. 512; Skinner v. Shepard, 130 Mass. 180; Tobey v. Moore, 130 Mass. 448; Beals v. Case, 138 Mass. 138; Atty.-Gen. v. Williams, 140 Mass. 329; Clark v. Martin, 49 Penn. St. 289; Tallmadge v. East R. Bank, 26 N. Y. 105.

Subject-matter. — The proper relationship between parties and estates is not all that is necessary to ensure that a covenant shall run with the land, for the law will not permit, as has been said, new and unusual incidents to be attached to land, by way either of benefit or of burden. Keppell v. Bailey, 2 Myl. & K. 517. The covenant must touch or concern the land and be reasonable and not merely a whim of the grantor. The following have been held personal covenants which would not run: That plaintiff should have exclusive right to run tubing to carry oil through other land of the grantor, Trans. Co. v. Pipe Line Co., 22 W. Va. 600; that if grantee should sell the land he would sell to grantor, Maynard v. Polhemus, 15 Pac. Rep. 451 (Cal.); that the grantor would not sell marl from other land retained by him, Brewer v. Marshall, 3 C. E. Green 337; S. C., 4 Id. 537; that the grantor would not open quarries on land retained by him, Norcross v. James, 140 Mass. 188; to pay mortgage debt, Glenn v. Canby, 24 Md. 127; but see Wilcox v. Campbell, 35 Hun 254; by grantor to pay taxes, Graber v. Duncan, 79 Ind. 565; of mortgagor to insure, Dunlop v. Avery, 89 N. Y. 592; Reid v. McCrum, 91 N. Y. 412; but see Thomas v. Von Kapff, 6 Gill & J. 372 contra; that if grantee should sell, his grantor (the covenantee)

should receive one-quarter of the purchase money, because in restraint of alienation, De Peyster v. Michael, 6 N. Y. 467; to pay grantor one-sixth of all the oil which might be produced on the granted premises; of grantee (a railroad), to carry all its passengers by the grantor's ferry, Wiggins Ferry Co. v. O. & M. Ry. Co., 94 Ill. 83.

In the following cases it has been held that the covenant would run: that the grantor of land and a banking house on it would not engage in the business of banking for ten years, Nat'l Union Bank v. Segur, 39 N. J. L. 173; by the lessor of a mill, dam etc., that he would not let or establish any other place or seat on the same stream to be used for sawing mahogany, Norman v. Wells, 17 Wend. 136 (collecting cases); of grantee to comply with conditions of a lease to which the premises were subject, Hallenbeck v. Kindred, 15 N. E. Rep. 887 (N. Y.); of lessee of oil lands, that he would "continue with due diligence and without delay to prosecute the business to success or abandonment," etc., Bradford Oil Co. v. Blair, 113 Penn. St. 83; of lessor of right to renew, Leppla v. Mackey, 31 Minn. 75; that rent should be settled by appraisers, to be appointed in a specified way, Worthington v. Hewes, 19 Ohio St. 66; of lessee to insure, Masury v. Southworth, 9 Ohio St. 340; to pull down old chimneys and put up new ones, Harris v. Coulbourn, 3 Harr. (Del.) 338; of lessee to erect buildings, and that lessor may buy at an appraisal, Bailey v. Richardson, 66 Cal. 416; of lessor that lessee may occupy such land as he clears for three years, Callan v. McDaniel, 72 Ala. 96; of lessor to convey on payment of \$500; Hagar r. Buck, 44 Vt. 285; Van Vorne v. Crain, 1 Paige 455; of lessor to repair, Gerzebek v. Lord, 33 N. J. L. 240; Allen v. Culver, 3 Den. 284; of lessee to pay rent, Smith v. Harrison, 42 Ohio St. 180; Patten v. Deshon, 1 Gray 325; Baldwin v. Walker, 21 Conn. 168; or to pay assessments, Post v. Kearney, 2 N. Y. 394; and if part of the premises only be assigned the rent will be apportioned, Van Rensselaer v. Bradley, 3 Den. 135; Pingrey v. Watkins, 15 Vt. 479; of lessor for quiet enjoyment, Shelton v. Codman, 3 Cush. 318.

How created. — It has always been considered that a grantee, by accepting a deed poll containing a stipulation that he should do or not do some act, thereby agreed to do or not to do that act, but whether he thereby made an agreement which could

be considered as a covenant which might run with the land is a question on which the courts have differed. It was held in the negative in Parish v. Whitney, 3 Gray 516; doubt was thrown upon the question in Bronson v. Coffin, 108 Mass. 175; but Parish v. Whitney was finally affirmed in Martin v. Drinan, 128 Mass. 515; Kennedy v. Owen, 136 Mass. 199. See also Hammond v. P. R. & A. R. R., 16 S. C. 567.

In Kennedy v. Owen, supra, the court say: "It is plain that an agreement, not under seal, cannot, technically speaking, run with the land. . . . It has never been held or considered in Massachusetts, so far as we are aware, that a stipulation like that contained in the deeds on which the plaintiff relies [that grantee should fence] would have the effect to create an easement of this peculiar description, the right to which could be asserted or protected by an action at law. It certainly is not an exception out of the estate granted. It is not strictly a reservation. It appears to be rather a mere personal obligation. imposed upon and assumed by the grantee, and binding upon him and his legal representatives as an implied contract entered into with the grantor; not amounting to a covenant or a charge upon the land, but an obligation, which, if enforceable at all against purchasers, is to be enforced against them by a court of equity alone, and having no more force and effect than in case of an express agreement not under seal between two owners of adjoining land."

In Mendell v. Delano, 7 Met. 176, it was held that a reservation in a deed of a right of way created an easement upon the wharf granted, which became appurtenant to it in the possession of assignees. See Bowen v. Conner, 6 Cush. 132.

In Burbank v. Pillsbury, 48 N. H. 475, after full discussion and reference to Parish v. Whitney, it was held that accepting a deed poll containing such a clause did constitute a covenant on the part of the grantee, which would run with the land, and this is in accordance with the general course of the decisions in this country. Kellogg v. Robinson, 6 Vt. 276; Wilcox v. Campbell, 35 Hun 254; Countryman v. Deck, 13 Abb. N. Cas. 110; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Bowen v. Beck, 94 N. Y. 86; Hodge v. Sloan, 107 N. Y. 244; Kentucky Central R'y v. Kenney, 82 Ky. 154; Poage v. W. St. L. & P. R.R., 24 Mo. App. 199; Maxon v. Lane, 102 Ind. 365; Georgia So. R.R. v. Reeves, 64 Ga. 492; Peden v. C., R. I., & P. R.R., 35 N. W.

Rep. 424 (Iowa); Maynard v. Moore, 76 N. C. 158; Norfleet v. Cromwell, 64 N. C. 1.

No especial words are necessary to make a covenant which will run with land: Trull v. Eastman, 3 Met. 121; and if such appear the intention, the clause will be so construed, though it appear in the deed as an express condition. Hartung v. Witte, 59 Wis. 285. See Hammond v. P. R. & A. R.R., 15 S. C. 10; S. C., 16 S. C. 576.

In a case where a railroad, on buying a right of way over land, made a verbal agreement to build a switch on the land, it was held that as this agreement, if it had been under seal, would have run with the land, it would be enforced against an assignee of the railroad in equity. Lydick v. B. & O. R.R., 17 W. Va. 427. See B. & A. R.R. v. Briggs, 132 Mass. 24; Wilder v. Me. Central R.R., 65 Me. 332; Divan v. Loomis, 68 Wis. 150.

Failure of title. — If any estate passes from the grantor to the grantee in a conveyance, it is enough to carry covenants. But if the title of the grantor wholly fails, so that no title to land passes to the grantee with which covenants can run, the grantee can take no advantage of them. Slater v. Rawson, 1 Met. 450; S. C., 6 Met. 439; Beardsley v. Knight, 4 Vt. 471; Devore v. Sunderland, 17 Ohio 52; Martin v. Gordon, 24 Ga. 533; Burtners v. Keran, 24 Gratt. 42; Allen v. Greene, 19 Ala. 34.

In Slater v. Rawson, 1 Met. 450, supra, the defendant was sued on his covenant of warranty by the assignee of his grantee, and, as it appeared that the defendant was not seized when he made his conveyance, it was held that, as nothing passed by his deed to his grantees, so they could pass no estate to their assignee which would authorize an action in his own name. The same case came up again, and at the second trial it was shown that the defendant, at the time of his conveyance, was in possession and occupation of the premises, and had so acquired "a legal, although not an indefeasible title to the land in question. He was lawfully seized and possessed of it against all the world, Jacobs only excepted. His title, therefore, by his grant, passed to his grantees, and from them by intermediate conveyances to the plaintiffs, with the covenant of warranty annexed; and for the breach of that covenant the plaintiffs are well entitled to damages. The defendant cannot set up in

defence a constructive seisin, or possession in a stranger. Such a defence has no foundation in law or in justice, and cannot be maintained." 6 Met. 439.

This doctrine, first developed in the above case, has been widely followed in this country, and if the covenantor is in possession at the time of the grant the covenants will run: Beddoe's Ex'r v. Wadsworth, 21 Wend. 120; Devore v. Sunderland, 17 Ohio 52; Bethell v. Bethell, 54 Ind. 428; Zent v. Picken, 54 Iowa 535; Semple v. Whorton, 68 Wis. 626; Wilson v. Widenham, 51 Me. 566; Lewis v. Cook, 13 Iredell 193; Dickinson v. Hoomes, 8 Gratt. 353.

It has been held that, as a mortgagor has parted with his legal estate, and as law is supposed to know nothing of his equity, he can transmit by his deed no estate with which covenants can run; McGoodwin v. Stephenson, 11 B. Mon. 21.

But a different and more liberal view has been taken, even where the legal title is held to pass to the mortgagee, and a conveyance of an equity of redemption held to carry covenants. White v. Whitney, 3 Met. 81; Astor v. Hoyt, 5 Wend. 603.

On the other hand, it is held in this country, though the rule in England seems the other way, that, at any rate as regards all the world except the mortgagee, the mortgagor is the owner of the estate, and the burden or benefit of covenants which run with the land will not come to the mortgagee as assignee, before he has taken possession under the mortgage, though they will after that. Astor v. Hoyt, 5 Wend. 603; Walton v. Cronley, 14 Wend. 63; Baldwin v. Walker, 21 Conn. 168; Calvert v. Bradley, 16 Howard 580.

But in some cases a mortgagee, though not in possession, has been considered an assignee to whom covenants would run: M'Murphy v. Minot, 4 N. H. 251; Farmers' Bank v. Mutual Ass. Soc., 4 Leigh 69; Mayhew v. Hardesty, 8 Md. 479.

A covenant, by one who has no present title, that neither he nor those claiming under him will claim any right in the premises conveyed, will run with the land and protect the heirs and assigns of the covenantee. Trull v. Eastman, 3 Met. 121.

Who can sue. — One to whom land has been conveyed with covenants of warranty, and has himself, before any breach, conveyed again with warranty, cannot sue on the covenants to himself so long as his covenantor is liable to a suit from the owner of the land at the time of the breach, for otherwise the

first grantor might be liable to a second suit, to which a judgment in the first would not be a bar. But after the original grantee has been damnified or has got a release of all damages from this grantee, he can maintain his action: Wheeler v. Sohier, 3 Cush. 219; McGoodwin v. Stephenson, 11 B. Mon. 21; Ex'ors of Van Rensselaer v. Ex'ors of Platner, 2 Johns. Cas. 17; Chase v. Weston, 12 N. H. 413; Booth v. Starr, 1 Conn. 244; Griffin v. Fairbrother, 10 Me. 91; Kane v. Sanger, 14 Johns. 89; Cole v. Kimball, 52 Vt. 639; Allen v. Little, 36 Me. 170.

If the breach occurred before the assignee took the land, he cannot sue on the covenant, for it was, as soon as the breach occurred, a mere chose in action, which would not run: Shelton v. Codman, 3 Cush. 318; Ladd v. Noyes, 137 Mass. 151; Devisees of Van Rensselaer v. Ex'ors of Platner, 2 Johns. Cas. 24.

An assignee of part of the land can sue or be sued for his proportionate part: Astor v. Miller, 2 Paige 68; Johnson v. Blydenburgh, 31 N. Y. 427; Van Rensselaer v. Bradley, 3 Den. 135; Coburn v. Goodall, 72 Cal. 498; Allen v. Little, 36 Me. 170.

Tenants in common can have a joint action: Blondeau v. Sheridan, 81 Mo. 545.

Who is liable. — An assignee is liable for all breaches while he holds the land, but not for any which occur after he has himself assigned: Hintze v. Thomas, 7 Md. 346; Donelson v. Polk, 64 Md. 501; Winfield v. Henning, 33 N. J. L. 240; Worthington v. Hewes, 19 Ohio St. 66; See Quain's Appeal, 22 Penn. St. 510.

The original covenantor is liable on his express covenants after assignment: Smith v. Harrison, 42 Ohio St. 180; Quackenboss v. Clarke, 12 Wend. 555; Shaw v. Partridge, 17 Vt. 626; Dewey v. Dupuy, 2 W. & S. 553; although the lessor may have recognized the assignee of the lease as tenant, and received rent from him. Shaw v. Partridge, 17 Vt. 626. But not on implied covenants after an assignment of the estate: Kimpton v. Walker, 9 Vt. 191.

Heirs are jointly chargeable as assignees: Morse v. Aldrich, 1 Met. 544.

If the land of the covenantor with which the covenant runs is subdivided, the covenant will not necessarily follow each

parcel, but only the part peculiarly affected by the burden. In Bronson v. Coffin, 118 Mass. 156, in which the court held that a covenant by the grantor to fence would run with other land retained by him, it was held that it would only run with the land remote from the fence. The court say: "If the grantor or his assign should sell a portion of the whole lot, so situated that the easement or servitude, from its nature, would not attach to or affect it, we see no reason why the covenant should run with such portion." "There is no privity of estate between such purchaser and the original covenantee or his assigns."

All the assignees may be joined or they may be sued separately: Hannen v. Ewalt, 18 Penn. St. 9; Wilson v. Taylor, 9 Ohio St. 595.

It has been held in Pennsylvania that the person equitably entitled to land, though the legal title is in another for him, is liable on a covenant by the grantor of his trustee to pay rent. Berry v. M'Mullen, 17 S. & R. 84; Elkinton v. Newman, 20 Penn. St. 281. But see Van Court v. Moore, 26 Mo. 92.

SEMAYNE'S CASE.

MICH. 2 JAC. 1. - IN THE KING'S BENCH.

[REPORTED 5 COKE, 91.]

Sheriff when entitled to break doors. — Application of maxim, "Every man's house is his castle."

In an action on the case by Peter Semayne, plaintiff, and Richard Gresham, defendant, the case was such (a), the defendant and one George Berisford were joint-tenants of a house in Blackfriars in London, for years, George Berisford acknowledged a recognizance in the nature of a statute-staple (b) to the plaintiff, and being possessed of divers goods in the said house died, by which the defendant was possessed of the house by survivorship in which the goods continued and remained; the plaintiff sued process of extent on the statute to the sheriffs of London; the sheriffs returned the conusor dead, on which the plaintiff had another writ to extend all the lands which he had at the time of the statute acknowledged, or at any time after, and all his goods which he had at the day of his death; which writ the plaintiff delivered to the sheriffs of London, and told them that divers goods, which were the said George Berisford's at the time of his death, were in the said house: and

(a) Co. Ent. 12, pl. 11; Mo. 968; Yelv. 28, 29; Cr. El. 908, 909; 2 Roll. Rep. 294. See the Report of this Case in Sir F. Moore, 668, where it appears that there was a division of opinion among the judges; and the same appears in Croke, 908, and that one of the dissentient judges withdrew his opinion. Whether a bailiff, &c., may break a house to do execution or not, see 6 Mod. 105, &c., ibid. See Hob.

263, where the parties were punished for executing the process of law in a riotous manner. [When a house may be pulled down as a private nuisance, Perry v. Fitzhowe, 8 Q. B. 757; Davis v. Williams, 16 Q. B. 546.]

(b) See an account of this sort of recognizance, and the mode of proceeding thereon, 2 Wms. Saund. 217, ed. 1871, in notis.

thereupon the sheriffs, by virtue of the said writ, charged a jury to make inquiry, according to the said writ, and the sheriffs and jury accesserunt ad domum prædictam ostio domus prædict' aperto existen' et bonis prædictis in prædicta domo tunc existen', and they offered to enter the said house, to extend the goods according to the said writ; and the defendant præmissorum non ignarus, intending to disturb the execution ostia præd' domus tunc aperto existen', claudebat contra vicecom' et jurator' præd'; whereby they could not come and extend the said goods, nor the sheriff seize them, by which he lost the benefit and profit of his writ, &c. And in this case these points were resolved:—

- 1. That the house of every one is to him as his (a) castle and fortress as well for his defence against injury and violence as for his repose; and although the life of a man is a thing precious and favored in law; so that although a man kills another in his defence, or kills (b) one per infortun', without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels (c), for the great regard which the law has to a man's life; but if thieves come to a man's (d) house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing, and therewith agree 3 E. 3; Coron. 303 and 305; and 26 Ass. pl. 23. So it is held in 21 H. 7, 39; every one may assemble his friends and neighbors (e) to defend his house against violence: but he cannot assemble them to go with him to the market (f) or elsewhere for his safeguard against violence: and the reason of all this is, because domus sua cuique est tutissimum refugium.
- 2. It was resolved, when any house is recovered by any real action, or by eject firmæ, the sheriff may break the house, and deliver the seisin or possession to the demandant or plaintiff, for the words of the writ are habere facias seisinam or possessionem, &c., and after judgment it is not the house, in right and judgment of law, of the tenant or defendant.

⁽a) 3 Inst. 162; Cr. El. 753, 2 Co. 32. a.; 7 Co. 6. a.; 8 Co. 126. a.; 11 Co. 82. a.; 1 Bulst. 146; Stanf. Cor. 14. b.

⁽b) Co. Lit. 391. a.; Hale's Pl.; Cor.32 Stanf.; Cor. 15, c. 16. d.

⁽c) [Not so now. See 24 & 25 Vict.c. 100, s. 7; 33 & 34 Vict. c. 23.]

⁽d) 3 Inst. 56; Stanf. Cor. 14. a. Cor. 192.; 3. E. 3; Cor. 205, 330; Br. Cor. 100; 1 Roll. Rep. 182; 22 H. 8. c. 5.

⁽e) 11 Co. 82 b.; Br. Riots, &c., 1; 21 H. 7, 39, a.; Fitz. Tresp. 246; 2 Inst. 161, 162.

⁽f) 11 Co. 82. b.; 1 Roll. Rep. 182.

3. In all cases when the king (a) is party, the sheriff (if the doors be not open) may break the party's house either to arrest him, or to do other execution of the king's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors; and that appears well by the statute of Westminster, 1, c. 17 (which is but an affirmance of the common law), as hereafter appears, for the law, without a default in the owner, abhors the destruction or breaking of any house (which is for the habitation and safety of man), by which great damage and inconvenience might ensue to the party, when no default is in him: for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it; and that appears by the book in 18 E. 5 (b) Execut. 252, where it is said that the king's officer who comes to do execution, &c., may open the doors which are shut, and break them, if he cannot have the keys; which proves that he ought first to demand them. 7 E. 3 (c) 16. J. beats R. so as he is in danger of death, J. flies, and thereupon hue and cry is made, J. retreats into the house of T., they who pursue him, if the house be kept and defended by force (which proves that first request ought to be made), may lawfully break the house of T., for it is at the king's suit. 27 Ass. p. 66. The king's bailiff may distrain for issues (d) in a sanctuary. 27 (28) Ass. p. 35. By force of a capias on an indictment of trespass the sheriff may (e) break his house to arrest him; but in such case, if he breaks the house when he may enter without breaking it (that is on request made, or if he may open the door without breaking), he is a trespasser. 41 Ass. 15. On issue joined on a traverse of an office in Chancery, Venire facias was awarded returnable in the King's Bench, without mentioning non (f) omittas propt' aliquam libertat'; yet, forasmuch as the king is party, the writ of itself is non omittas propt' aliquam libertat'. 9 E. 4.9; that for felony (g) or suspicion of felony, the king's officer may break the house

⁽a) O. Benl. 112; 1 Bulst. 146; Cr. El. 908, 909; Moor, 606, 668; Yelv. 28, 29; Cr. Car. 537, 538; 3 Inst. 234; 4 Leon. 41.

⁽b) Yelv. 29; 5 Co. 92. b.; Cr. El. 909; Moor, 668.

⁽c) 4 Inst. 177.

⁽d) Br. Distress 35; Br. Trespass 151.

⁽e) Fitz. Trespass, 232; Br. Trespass, 248.

⁽f) Br. Prerogative le Roy, 109; Br. Franchise, 18; Br. Process, 102; Fitz. Prerogative, 21.

⁽g) 13 E. 4. 9. a.; Fitz. Bar. 110; 4 Inst. 177; 1 Bulstr. 146; 2 Bulstr. 61.

to apprehend the felon, and that for two reasons: 1. for the commonwealth, for it is for the commonwealth to apprehend felons. 2. In every felony the king has interest, and where the king has interest the writ is non omittas propter aliquam libertatem; and so the liberty or privilege of a house doth not

hold against the king.

4. In all cases when the door is (a) open the sheriff may enter the house, and do execution, at the suit of any subject, either of the body or of the goods; and so may the lord in such case enter into the house (b) and distrain for his rent or service, 38 Hen. 6. 26. a. 8 E. 2 Distr. 21, and 33 E. 3. Avow, 256; the lord may distrain in the house, although lands are also held in which he may distrain. Vide 29 (c) Ass. 49. But the great question in this case was, if by force of a Capias or Fieri facias at the suit of the party the sheriff, after request made to open the door, and denial made, might break the defendant's house, to do execution, if the door be not opened. And it was objected that the sheriff might well do it for divers causes. 1. Because it is by process of law; and it was said, that it would be granted on the other side, that a house is not a liberty; for if a Fieri facias or a Capias be awarded to the sheriff at the suit of a common person, and he makes a mandate to the bailiff of a liberty who has return of writs, who nullum dedit respons', in that case another writ shall issue with non omittas propter aliquam libertatem; (d) yet it will be said on the other side that he shall not break the defendant's house, as he shall do of another liberty; for whereas in the county of Suffolk there are two liberties, one of St. Edmund Bury, and the other of St. Ethelred of Ely, suppose a Capias comes at the suit of A. to the sheriff of Suffolk to arrest the body of B., the sheriff makes a mandate to the bailiff of the liberty of St. Ethelred, who makes no answer, in that case the plaintiff shall have a writ of non omittas, and by force thereof he may arrest the defendant within the liberty of Bury, although no default was in him. 2. Admitting it to be a liberty, the defendant himself shall never take advantage of a liberty: as if the bailiff of a liberty be defendant in any action, and process of Capias or Fieri facias comes to the sheriff against him, the sheriff shall

⁽a) 1 Brownl. 50; Cr. Jac. 486.

⁽c) Br. Disseisor, 52; Fitz. Assize,

⁽b) Br. Trespass, 226; Br. Issue,

^{286;} Lucas, 290. (d) Cro. Jac. 555.

execute the process against him; for a liberty is always for the benefit of a stranger to the action. 3. For necessity the sheriff shall break the defendant's house after such denial as aforesaid, for at the common law a man should not have any execution for debt, but only of the defendant's goods. Suppose then the defendant would keep all his goods in his house, the defendant himself, by his own act, would prevent not only the plaintiff of his just and true debt, but there would also be a great imputation to the law, that there should be so great a defect in it, that in such case the plaintiff by such shift without any default in him should be barred of his execution. And the book of 18 E. 2 (a), Execut. 252, was cited to prove it, where it is said, that it is not lawful for any one to disturb the king's officer who comes to execute the king's process; for if a man might stand out in such a manner, a man would never have execution, but there it appears (as has been said) that there ought to be request made before the sheriff breaks the house. (b) 4. It was said, that the sheriffs were officers of great authority, in whom the law reposed great trust and confidence, and are to be of sufficiency to answer for all wrongs which should be done; and they had custodiam comitat', and therefore it should not be presumed that they would abuse the house of any one, by color of doing their office in execution of the king's writs, against the duty of their office, and their oath also. But it was resolved, that it is not lawful for the sheriff (on request made and denial) at the suit of a (c) common person, to break the defendant's house, sc. to execute any process at the suit of any subject; for thence would follow great inconvenience, that men as well in the night (d) as in the day should have their houses (which are their castles) broke, by color whereof great damage and mischief might ensue; for by color thereof, on any feigned suit, the house of any man, at any time, might be broke when the defendant might be arrested elsewhere, and so men would not be in safety or quiet in their own houses. And although the sheriff be an officer of great authority and trust, yet it

⁽a) Yelv. 29; 5 Co. 91. b; Moor, 668; Cr. El. 409; O. Benl. 121.

⁽b) See 18 E. 4. 4. contra.

⁽c) 1 Jones, 429, 430; 1 Brownl. 50; 1 Bulstr. 146; Cr. Jac. 556; O. Benl. 121; 4 Inst. 177; Palm. 53; Dyer, 36, pl. 41; Moor, 668; Cr. Car. 537, 538;

Cr. El. 908, 909; Yelv. 29; Hob. 62, 263, 264; 4 Leon. 41; 11 Co. 82; March. 34; 18 E. 4. 4. a.; Br. Execut. 100; Br. Trespass, 390.

⁽d) 9 Co. 66. a; Cr. Jac. 80, 486; Jenk. Cent. 291; Hale's Pl. Cor. 45, Owen, 63.

appears, by experience, that the king's writs are served by bailiffs, persons of little or no value: and it is not to be presumed that all the substance a man has is in his house, nor that a man would lose his liberty, which is so inestimable, if he has sufficient to satisfy his debt. And all the said books, which prove that when the process concerns the king the sheriff may break the house, imply that at the suit of the party the house may not be broken: otherwise the addition (at the suit of the king) would be frivolous. And with this resolution agrees the book in (a) 13 E. 4. 9, and the express difference there taken between the case of felony, which (as has been said) concerns the commonwealth, and the suit of any subject, which is for the particular interest of the party, as there it is said. In (b) 18 E. 4. 4, a. by Littleton and all his companions it is resolved that the sheriff cannot break the defendant's house by force of a Fieri facias, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good. And it was said, that the said book of (c) 18 E. 2. was but a short note, and not any case judicially adjudged, and it doth not appear at whose suit the case is intended, but it is an observation or collection (as it seems) of the reporter. And if it be intended of a Quo (d) minus, or other action in which the king is party, or is to have benefit, the book is good law.

5. It was resolved, that the house of any one is not a castle or privilege but for himself, and shall not extend to protect any (e) person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases, after denial on request made, the sheriff may break the house; and this is proved by the statute of West. 1. c. (f) 17, by which it is declared that the sheriff may break a house or eastle to make replevin, when the goods of another which he has distrained are by him,

⁽a) 13 E. 4. 9. a; 5 Co. 92 a; Fitz. Bar. 110; 4 Inst. 177.

⁽b) Cro. Eliz. 909; Yelv. 29; Br. Execution, 100; Br. Trespass, 309.

⁽c) 18 E. 2; Execut. 252; Yelv. 29;

Moor, 668; Cr. El. 909; 5 Co. 91. b. 92. b; O. Benl. 121.

⁽d) Plowd. 208. a; 2 Show. 87.

⁽e) Cr. Car. 544.

⁽f) 2 Inst. 192, 193, 194.

i. e. the distrainer, conveyed to his house or castle to prevent the owner to have a replevin of his goods; which act is but an affirmance of the common law in such points. But it appears there that, before the sheriff in such case breaks the house, he ought to demand the goods to be delivered to him: for the words of the statute are, "after that the cattle shall be solemnly demanded by the sheriffs," &c.

6. It was resolved, admitting that the sheriff, after denial made, might have broke the house, as the plaintiff's counsel pretend he might, then it follows that he has not done his (a) duty, for it doth not appear that he made any request to open the door of the house. Also the defendant, as this case is, has done that which he might well do by the law, seil. to shut the door of his own house.

Lastly, the general allegation (b), præmissorum non ignarus, was not sufficient in this case, where the notice of the premises is so material; but in this case it ought to have been certainly, and directly, alleged; for, without notice of the process of law, and of the coming of the sheriff with the jury to execute it, the shutting of the door of his own house was lawful. And judgment was given against the plaintiff.

Although the sheriff, as appears from this case, may justify (after request made) the breaking open the doors of a third person's house in order to execute the process of the law upon the defendant or his property, removed thither in order to avoid an execution, still he does so at his peril; for, if it turn out that the defendant was not in the house, or had no property there, he is a trespasser. Johnson v. Leigh, 1 Marsh, 565, 6 Taunt, 244; Ratcliffe v. Burton, 3 B. & P. 229; explained in Hutchison v. Birch, 4 Taunt. 627; Com. Dig. Execution, C. 5. See White v. Wilshire, Palm. 52; 2 Rolle 138; Biscop v. White, Cro. Eliz. 759; and judgment in Cooke v. Birt, 5 Taunt. 769; but his right to enter the defendant's own house does not depend on any such contingency, for that is the most natural place for the defendant or his goods to be. And on the same principle, where there is a judgment against an administratrix de bonis testatoris, and she marries, the sheriff may enter her husband's house to search for the goods of the testator. Cook v. Birt, 5 Taunt. 771; and although the sheriff must not break open the outer door of the defendant's house in order to execute the process (see Kerbey v. Denbey, 1 M. & W. 336), yet, having obtained admission to the house, he may justify the afterwards breaking open inner doors in order to execute the process, as he may cupboards, trunks, &c., Lee v. Gansel, Cowp. 1; R. v. Bird, 2 Show. 87; Hutchison v. Birch, 4 Taunt. 619; see Rat-

⁽a) Stile, 447. Hollingsworth v. Brodrick, 7 A. & E.

⁽b) Hard. 2; 1 Mod. Rep. 286; See 40.

cliffe v. Burton, 3 B. & P. 223. And the maxim, that "a man's house is his castle," only extends to his dwelling-house; therefore a barn, or outhouse, not connected with the dwelling-house, may be broken open in order to levy an execution, Penton v. Browne, 1 Sid. 181, 186; but not to make a distress for rent, Brown v. Glenn, 16 Q. B. 524. And if the defendant, after being arrested, escape, the sheriff may break open either his own house, or that of a stranger, for the purpose of retaking him. Anon. 6 Mod. 105, Lofft, 390; vide Lloyd v. Sandilands, 8 Taunt. 250 [Sandon v. Jervis, 1 E. B. & E. 935; S. C. in error, ib. 942]. So where a bailiff who has entered the house to distrain, or execute process, is forcibly ejected, he may break open the door in order to reënter, Eagleton v. Gutteridge, 11 M. & W. 465; Pugh v. Griffiths, 7 A. & E. 838; Aga Kurboolie Mahomed v. The Queen, 4 Moore (Privy Council), 239 [Bannister v. Hyde, 3 El. & El. 627; 29 L. J. Q. B. 141].

It is above stated that the sheriff cannot justify breaking open the outer door of a stranger's house, unless it prove that the defendant or his goods are actually there; if they be not there he will be a trespasser. This doctrine has been carried still farther; for it has been thought that he cannot, even though he may have grounds for suspicion, justify entering the dwelling-house of a third person, although he break no door, unless it prove in the event that the defendant or his goods were actually therein. In Cooke v. Birt, 5 Taunt. 765, Dallas, J., says, "The sheriff may enter the house of a stranger if the door be open; but it is at his peril whether the goods be found there or not; if they be not, he is a trespasser." The expressions of Gibbs, C. J., are to the same effect. In Johnson v. Leigh, 6 Taunt. 246, in trespass for breaking and entering the plaintiff's house, and breaking the inner doors, locks, &c., the defendant, as sheriff, justified entering under a testatum capias, against T. Johnson, the outer door being open, and there being reasonable and sufficient cause to suspect and believe, and the defendant suspecting and believing, that T. Johnson was in the house. On demurrer, Gibbs, C. J., said, "In Hutchison v. Birch, 4 Taunt. 619, the goods were in the house, here the defendant only avers a suspicion that T. Johnson was in the house; I protest that the court have not decided this point, or dropped, in the case of Hutchison v. Birch, anything which favors the opinion, that it may not go abroad to the world that we have so decided." Leave was given to amend the plea.

However, it is apprehended that circumstances might exist, under which the sheriff would be justified in entering the house of a stranger on suspicion, though the defendant were not actually there. Supposing, for instance, that the defendant were on a visit with the stranger, the dwelling-house of the stranger would seem to be, pro tempore, the defendant's dwelling-house, so as to entitle the sheriff to enter it; upon the principle on which Cooke v. Birt was decided, namely, that of its being the place where it would be natural to expect the defendant, or his goods, to be. I have seen a plea framed on that idea; and, indeed, the point is virtually so ruled by Sheere v. Brooks, 2 H. Bl. 120, where it was held, that, when the defendant resided in the house of a stranger, the bail above might justify entering it in order to seek for him, the outer door being then open; for, said Lord Loughborough, "I see no difference between a house of which he is solely possessed, and a house in which he resides with the consent of another:" but the defendant must at least be residing in the stranger's house at the time. See Moorish v. Murray, 13 M. & W. 52, where a plea stating that "for six months next preceding the trespasses," the defendant "had resided" in the plaintiff's house, was held insufficient, even after verdict. It seems to follow from this, that, as a house in which the defendant habitually resides is on the same footing with respect to executions as his own house, the

sheriff would not be justified in breaking the outer door of such a house, even after demand of admittance and refusal. There may, perhaps, be another case in which the sheriff might justify entering the house of a stranger, upon bare suspicion, riz., if the stranger were to use fraud, and to inveigle the sheriff into a belief that the defendant was concealed in his house, for the purpose of favoring his escape, while the officers should be detained in searching, or for any other reason, it might be held that he could not take advantage of his own deceit so as to treat the sheriff, who entered under the false supposition thus induced, as a trespasser; or, perhaps, such conduct might be held to amount to a license to the sheriff to enter. See Price v. Harwood, 3 Camp. 108; Walker v. Willoughby, 6 Taunt. 530; and an anonymous case in Chitty's Gen. Prac. of Law, 1st ed., vol. 3, p. 354, n. x.

As to the means by which an entry may be effected without being considered a breaking of the door, it has been held that a landlord may, in order to make a distress, open the outer door in the way in which other persons using the building are accustomed to open it, e.g., where the door was fastened by a padlock attached to a movable staple, by pulling out the staple; and the Court of Exchequer in so deciding questioned the authority of the passage in Comyn's Digest, Execution, c. 9, that a sheriff cannot open the outer door, though it be only latched, and said that at all events that passage only applied to a dwellinghouse: Ryan v. Shilcock, 7 Exch. 72, more fully reported 21 L. J. Exch. 55. In Curtis v. Hubbard, 1 Hill's New York Reports 337, on the other hand, it was laid down that to make the sheriff a trespasser, it is enough that the outer door be shut; that merely opening is a breaking in law; that lifting a latch is as much a breaking in law as the forcing of a bolted door; and that whatever would be a breaking in burglary would be a breaking by the sheriff. It seems not altogether without difficulty to reconcile the dicta in Ryan v. Shilcock with the cases as to burglary (collected in Jervis' Archbold by [Bruce, 20th edition, 568). If a pane in a window of the house is broken, but not by the officer, he may lawfully put his hand through the aperture in order to make the arrest: Sandon v. Jervis, 1 E. B. & E. 935; S. C. in error, ib. 942. If the window be shut, but not fastened, it may not be opened for the purpose of distraining, Nash v. Lucas, L. R. 2 Q. B. 590. Accordingly, where a man employed by the landlord upon the premises (but not for the purposes of a distress), having at the suggestion of a broker effected an entrance from the area into the house by opening a window, which was shut but not fastened, afterwards opened the front door to the broker, it was held that the entry must be taken to be all one act, and was unlawful, ib. But entry may be lawfully made for the purpose of distraining by further opening a window which is already partially open: Crabtree v. Robinson, 15 Q. B. D. 312; 54 L. J. Q. B. 544.]

The distinction taken in the principal case between process at the suit of the king and that of an individual, is recognized in Burdett v. Abbott, 14 East 157; Launock v. Brown, 2 B. & A. 592; 2 Hale, P. C. 117; Foster on Homicide, p. 320. [When a writ of attachment had issued for disobedience to an order of court directing the delivery up of documents, it was held that the officer executing the writ might break open outer doors: Harvey v. Harvey, 26 Ch. D. 644. The distinction is to be noted between attachment as an ancillary remedy for compelling the payment of money, and attachment for disobedience to an order other than for the payment of money, which latter partakes of a criminal character. Ibid.; and see In re Freston, 11 Q. B. D. 545; 52 L. J. Q. B. 545; In re Dudley, 12 Q. B. D. 44; 53 L. J. Q. B. 16].

It is laid down in the text, that, before the sheriff breaks the outer door of a stranger's house, in those cases in which he has a right to do so, he ought to

demand admission; and this is also necessary when he breaks open the defendant's own doors in order to execute the process of the Crown, Launock v. Brown, 2 B. & A. 592; even in case of felony, 2 Hale, P. C. 117; Foster on Homicide, p. 320; or in order to retake the defendant after an escape; see Genner v. Sparks, 1 Salk, 79; 6 Mod. 173; White v. Wilshire, 2 Rolle's Rep. 138. See Palm. 52, where the bailiffs were imprisoned, and the door broken to rescue them. On a similar principle in De Gondouin v. Lewis, 10 A. & E. 120, the court thought that, before seizing contraband goods from the person, the officers ought to demand them. But, though it was considered in Ratcliffe v. Burton, 3 B. & P. 223, that admission should be demanded before breaking an inner door, the contrary was decided in Hutchison v. Birch, 4 Taunt. 619. In Pugh v. Griffiths, 7 A. & E. 827, the sheriff's officer, under a fieri facias, had lawfully entered a house and seized goods there, and the outer door being locked upon him, he was held justified in breaking it open to carry away the goods, there being no one whom he could request to open it. [There does not appear to have been any demand of entry in Sandon v. Jerris, 1 E. B. & E. 935, 942, where the sheriff's officer was held to have been justified in breaking open the outer door after having arrested the plaintiff under a ca. sa. by touching him through a hole in a window of the house.] In Aga Kurboolie Mahomed v. The Queen, 4 Moore (Privy Council), 239, a sheriff's officer, in the execution of a bailable writ, lawfully entered a house, but, before he could arrest, was forcibly expelled; he obtained assistance, and, without demand of reëntry, broke open the outer door, reëntered, and made the arrest, the Judicial Committee of the Privy Council held the officer and his assistants justified. To use the pointed language of the judgment, which was delivered by Lord Campbell: "The outer door being open, they were entitled to enter the house under civil process, and, they being lawfully in the house to arrest him, he was guilty of a trespass by expelling them. The act of locking the outer door was unlawful, and he could confer no privilege upon himself by that unlawful act."

The law upon this subject is so well, and at the same time briefly, summed up by Sir Michael Foster, in his Discourse of Homicide, pp. 319, 320, that I cannot forbear inserting his account of it in his own words; it is as follows:—

"The officer cannot justify breaking open an outward door or window in order to execute process in a civil suit. If he doth he is a trespasser. But if he findeth the outward door open, and entereth that way, or if the door be opened to him from within, and he entereth, he may break open inward doors if he findeth that necessary in order to execute his process.

"The rule, that 'every man's house is his castle,' when applied to the case of arrests upon legal process, hath been carried as far as the true principles of political justice will warrant, perhaps beyond what, in the scale of sound reason and good policy, they will warrant. . . . But this rule is not one of those that will admit of any extension. It must, therefore, as I have before hinted, be confined to the breach of windows and outward doors intended for the security of the house against persons from without endeavoring to break in.

"It must likewise be confined to a breach of the house in order to arrest the occupier or any of his family who have their domicile, their ordinary residence, there. For if a stranger, whose ordinary residence is elsewhere, upon a pursuit, taketh refuge in the house of another, this is not his castle, he cannot claim the benefit of sanctuary in it." [See Watson on the Office of Sheriff, 128.]

"The rule is likewise confined to the case of arrests in the first instance; for, if a man being legally arrested (and laying hold of the prisoner and pronouncing the words of arrest is an actual arrest) escapeth from the officer and taketh shelter, though in his own house, the officer may, upon fresh suit, break open

doors in order to retake him, having first given due notice of his business and demanded admission, and been refused.

"And let it be remembered that not only in this, but in every case where doors may be broken open in order to arrest, whether in cases criminal or civil, there must be such notification, demand, and refusal, before the parties concerned proceed to that extremity.

"The rule already mentioned must likewise be confined to the case of arrests upon process in civil suits; for, where a felony hath been committed, or a dangerous wound given, or even where a minister of justice comes armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; doors may, in any of these cases, be forced; the notification, demand, and refusal before mentioned having been previously made. In these cases, the jealousy with which the law watches over the public tranquillity (a laudable jealousy it is), the principles of political justice, I mean the justice which is due to the community ne maleficia remaneant impunita, all conspire to supersede every pretence of private inconvenience, and oblige us to regard the dwellings of malefactors, when shut against the demands of public justice, as no better than the dens of thieves and murderers, and to treat them accordingly. But bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony hath been actually committed, unless the officer cometh armed with a warrant from a magistrate, grounded on such suspicion."

It is laid down in the principal case that the sheriff breaking an outward door to do execution "is a trespasser by the breaking, and yet the execution which he then doth in the house is good." The authority referred to for this proposition is the Year Book of 18 E. 4, Pasch. 4 a. In that case, after fieri facias issued, the defendant locked up all his goods in his house, whereupon the sheriff broke open the outer door of the house, entered, and seized the goods; and the question which appears to have been raised on a motion, though the form of the proceeding is not distinctly stated, was, whether the sheriff had done any wrong or not. "Littleton and all his companions held that the party may have a writ of trespass against the sheriff for the breaking of the house, notwithstanding this fieri facias, for the fieri facias shall not excuse him of the breaking of the house, but of the taking of the goods only." It is laid down accordingly, in Bacon's Abridgment, Execution (N), "that if the sheriff in executing a writ break open a door, where he has no authority for so doing by law, yet the execution is good, and the party has no other remedy but an action for trespass against the sheriff." This, so far as relates to an execution against goods, is consistent with the doctrine acted upon by the Court of Queen's Bench in De Gondouin v. Lewis, 10 A. & E. 120, where the defendant, a custom-house officer, without demand, or any circumstance to justify the use of force, violently took contraband goods from the manual possession of the plaintiff. An action of trespass was brought for that seizure, not complaining of the assault. The Court of Queen's Bench held, that the fact of the goods being forfeited was an answer to that action, notwithstanding that, if the plaintiff had sued in trespass for an assault, there would have been no justification. And the reason of the thing, as well as the authority of Coke and of Littleton, seems to be with the decisions, for the execution creditor not taking part in the execution has been guilty of no wrong, and the maxim nullis commodum capere potest de injurià suà proprià (see Co. Litt. 148 b) is therefore not violated by holding so much of the acts of the sheriff as was for the benefit of the execution creditor valid, and the rest illegal. However, in Yates v. Delamayne, Trin. T., 17 Geo. III., Bacon's Abridgment, Execution (N), an execution against the goods is

stated to have been set aside on the ground that the outer door had been illegally broken open for the purpose of making the seizure. That case, though hard it may be considered, if interfering with a strict legal right of the execution creditor, is perhaps not irreconcilable with the doctrine under discussion; because it is quite consistent with the validity of the execution in point of law, that the court, to prevent an abuse of its process and the danger of collusion between the execution creditor and the sheriff, should, in the exercise of its symmary jurisdiction, undo the proceedings according to the principle acted on in Barrett v. Price, 9 Bing. 566, and other cases [and recognized in Hooper v. Lane, 6 H. of L. Cases 443]. It was the practice, in like manner, to discharge persons taken under process against the person by means of an illegal entry into a dwelling-house; Hodgson v. Towning, W. W. & H. 53; 5 Dowl. 410. And there is authority for saying that an arrest of the person by means of an illegal breaking of the outer door is altogether void, and that the sheriff is liable, in case of such arrest, not merely for the breaking and entering of the house, but also for the assault and imprisonment. See Kerbey v. Denbey, 1 M. & W. 336; Tyrw. & Gr. 688.

Since the [third] edition of this work the point was raised, but not decided, in *The Duke of Brunswick* v. *Slowman*, 8 C. B. 317; and in *Percival* v. *Stamp*, 9 Exch. 167, which latter case seems to be an authority in favor of the distinction above suggested. [The 32 & 33 Vict. c. 62, however, which abolishes imprisonment for debt, except in certain special cases, has rendered this point of com-

paratively small importance.]

It may here be added, that in a case like Yates v. Delamayne, supra, inasmuch as the seizure by the sheriff under a fieri facias, of goods to the value of the judgment debt, is said to operate by way of satisfaction (Wilbraham v. Snow, 5 Wms. Saund. p. 87, Ed. 1871, note (1), and per cur. Holmes v. Newlands, 5 Q. B. 370), a question may arise as to the defence of the execution creditor to an auditâ querelâ, after the goods have been ordered to be restored to the execution debtor. Probably the bringing of an auditâ querelâ would be considered as a breach of good faith, after a successful application to restore the goods [and the court or judge would refuse to allow the writ to issue; see Reg. Gen. Hil. T. 1853, r. 79, and Deane v. Ker, 4 Exch. 82]. If not, the alternative would be to hold the sheriff liable to the execution creditor as upon a lawful seizure; and indeed in such a case it would perhaps be difficult to suggest what valid defence the sheriff could make. It would, however, be a wild sort of justice to make him pay the debt and costs by way of additional punishment of his illegal entry, for which he would, at all events, be liable to answer in damages to the debtor. At least it should seem that the jurisdiction exercised in Yates v. Delamayne (except in cases where the execution creditor has employed a special bailiff, or been privy to the illegal entry) ought to be administered with great precaution. [It is, however, said by Holt, C.J., in Clerk v. Withers, 6 Mod. 293 (to which the above note in Wms. Saund, refers), that the seizure does not discharge the debtor if the execution is afterwards avoided. The taking of a debtor's person on a ca. sa., though operating as an election binding the creditor to proceed by that means only, was not an absolute extinguishment of the debt. See Thomson v. Parish, 5 C. B. N. S. 690, 28 L. J. C. P. 153; Taylor v. Waters, 5 M. & S. 103; Foster v. Jackson, Hob. 59; Woodward v. Pell, L. R. 4 Q. B. 58; nor did such taking and subsequent discharge destroy an attorney's lien for costs. O'Brien v. Lewis, 32 L. J. Ch. 665. And by 32 & 33 Vict. c. 62, an Act for the Abolition of Imprisonment for Debt, which nevertheless retains the power of committal for certain classes of debts, under certain conditions, it is enacted, section 5, sub-section 2, "That no imprisonment under that section shall operate as a satisfaction or extinguishment of any debt or demand, or cause of action, or deprive any person of the right to take out execution against the lands, goods, or chattels, of the person imprisoned in the same manner as if such imprisonment had not taken place."

The case of *Hooper* v. *Lane*, 6 H. of L. Cases 443, decided that the sheriff cannot arrest or detain a debtor already in custody on an invalid writ. See *Ockford* v. *Freston*, 6 H. & N. 466; S. C. 30 L. J. Exch. 89; but also *Bateman* v. *Freston*, 30 L. J. Q. B. 133; *Exparte Freston*, 30 L. J. Ch. 460.]

Forcible Entry into Dwelling-house to make Arrest where King is party.

In the principal case it is resolved that a sheriff in execution of the king's process could, after his demand for admittance and refusal by the occupant, lawfully break into the party's house. Previous demand is necessary, even in case of felony, 2 Hale P. C. 117; and in case of misdemeanor, Launock v. Brown, 2 B. & A. 592. See Foster on Homicide, 320; State v. Smith, 1 N. H. 346; Bell v. Clap, 10 Johns. 263; State v. Shaw, 1 Root (Conn.) 134; Kelsy v. Wright, Ib. 83. In Hodson v. Towning, 5 Dowl. P. R. 410; W. W. & H. 53; a prisoner was ordered discharged from the custody of an officer who had arrested him on a ca. sa., by breaking into his dwelling-house. The principle was recognized in Hooper v. Lane, 6 H. L. C. 535; 27 L. J. Q. B. 75. Contempt is treated in the nature of a criminal proceeding, and a sheriff armed with the writ of attachment against a party to an action for contempt in court has been held liable for neglect to break open the outer door of a dwelling-house for the purpose of executing the writ: Harvey v. Harvey, 26 Ch. D. 644; 33 W. R. 76; 48 J. P. 468. And see for other cases of contempt, in re Freeston, 11 Q. B. D. 545; Burdett v. Abbott, 14 East. 1, 157.

Breaking into Dwelling-house in Execution of Civil Process. 1. Arrest. 2. Attachment.

In the principal case it was resolved that it was not lawful for a sheriff to break a defendant's house to execute any process at the suit of a subject, even if he makes a request for admittance and is denied.

1. Arrest. — See Com. Dig. Execution (c. 5); Six Carpenters' Case, 8 Rep. 146 a. An indictment will not lie against a debtor

who commits an assault upon an officer who has broken the outer door of the debtor's house to arrest him on an execution. State v. Hooker, 17 Vt. 658; S. P., Hooker v. Smith, 19 Vt. 151. [See Keith v. Johnson, 1 Dana (Ky.) 604, for sheriff's right to enter dwelling-house to take a slave on execution.]

Where stairs led from a stable-yard to an open gallery, from which opened doors to different apartments, breaking a door across that part of the gallery which led to the chamber where the plaintiff was was held to be breaking the outer door of the plaintiff's dwelling; Hopkins v. Nightingale, 1 Esp. 99. An entry through a hole in an outer wall into a small room, thence through a staircase window by tearing away the boards, was held an unjustifiable entrance into the plaintiff's house; Whalley v. Williamson, 7 C. & P. 294. An officer may break and enter the house in the immediate pursuit of an escaped prisoner, Lofft 390 [and see White v. Wilshire, 2 Roll. Rep. 138; Genner v. Sparks, 6 Mod. 173]. An officer who has arrested the defendant by touching him through a broken pane of glass is justified in afterward further breaking the window for the purpose of entering to secure the defendant, Lloyd v. Sandilands, 8 Taunt. 250; or in breaking the door of the house, Sandon v. Jervis, El. & Bl. & El. 935; S. C., in error, Id. 942. Where a bailiff after peaceable entry is forcibly ejected, he may break open the door without demand in order to reënter, Aga Kurboolie Mahomed v. The Queen, 4 Moore P. C. 239 [see Bannister v. Hyde, 2 El. & El. 627; 29 Law J. Q. B. 141].

2. Attachment. — A sheriff cannot lawfully enter a dwelling-house upon civil process by forcing his way in after the door has been partially opened to his knock: Parke v. Evans, Hob. 62 a. But it is held that an assault upon an officer who had gained entrance to a debtor's house by fraud was not justifiable, Rex v. Backhouse, Lofft, 62. It is enough to make the sheriff a trespasser if the door be only latched, Com. Dig. Execution, c. 9; Boggs v. Vandyke, 3 Han. (Del.), 288; an entry by a landlord's agent through a window of a dwelling-house shut but not fastened, for the purpose of distraint, is unlawful: Nash v. Lucas, 20 L. R. 2 Q. B. 590; see Curtis v. Hubbard, 1 Hill (N. Y.) 336; and a sheriff cannot authorize any one to break the outer door of a dwelling to execute a fi. fa., Calvert v. Stone, 10 B. Mon. 152. But where a bailiff has peaceably entered under a warrant for distress of rent, and has been for-

cibly expelled, he is justified in breaking and entering, Eagleton v. Gutteridge, 11 M. & W. 465; and after a lawful entry and lawful seizure can break the outer door to get out, Pugh v. Griffiths, 7 Ad. & El. 838.

Other Buildings than Dwellings.

A barn may be broken open in order to levy an execution, Penton v. Browne, 1 Sid. 181; or a store, Haggarty v. Wilbur, 16 Johns. (N. Y.) 287; Solinsky v. Lincoln Sav. Bank, 4 S. W. 836 (Tenn.), but cannot break the outer door of a store used also as a dwelling by the defendant, Welch v. Wilson, 34 Minn. 92. In Brown v. Glenn, 20 L. J. Rep. (N. S.) Q. B. 205, it was held that a landlord could not lawfully break and enter a stable for the purposes of distraint. It appeared that the groom slept in a room over the stable, and it was argued that this fact constituted the building a dwelling-house; but the court held that the question was immaterial and that the landlord was liable for the trespass. A distinction is made by the court in this decision between the rights of a landlord and a sheriff [see 2 Wm. Saunders, 484 c. n. 2]. In Ryan r. Shilcock, 7 Exch. 72; 21 L. J. Exch. 55, it was decided that a landlord might enter a tenant's barn in order to distrain if he entered in the ordinary way of lifting the latch or turning the key, and Pollock, C. B., in a reference to the passage in Com. Dig. Exec. c. 9, remarked that the passage applied only to a sheriff entering a dwelling-house under an execution.

The validity of seizure or execution when the entry is unlawful.

In the principal case it was resolved that the sheriff cannot break the defendant's house by force of a fi. fa., but he "is a trespasser by the breaking, and yet the execution which he then doth in the house is good." The authority for this proposition is the Year Book of 18. of E., 4, Pasch. 4 a. And for the same proposition see Bacon's Abridgment Exec. N. But in Yates v. Delamayne, Trin. T., 17 Geo. III. Bac. Abr. exec. N., an execution against goods is stated to have been set aside, on the ground of the illegal breaking of the outer door for the purpose of making the seizure. Percival v. Stamp, 9 Exch. 167; and the Duke of Brunswick v. Slowman, 8 C. B. 317;

although the point was not expressly decided, seem to be authorities in favor of the proposition in the principal case. (The seizure by the sheriff under a fi. fa. of goods to the value of the judgment debt is said to operate by way of satisfaction; Wilbraham v. Snow, 2 Wm. Saund., p. 87, edition 1871, note 1, and per. cur. Holmes v. Newlands, 5 Q. B. 370.) In Ilsley v. Nichols, 12 Pick. 270, it was held that an attachment made after forcing the outer door of a dwelling-house is unlawful and invalid, and Shaw, C. J., expressed an opinion that this point was not raised nor decided in Semayne's Case, and that the real point decided in the Year Book 18 E. 4 was that a fi. fa. will not excuse an officer for breaking a dwelling-house. See Heminway v. Saxton, 3 Mass. 222; which holds that the breaking of the house is unlawful, there being no question of the validity of the attachment; and see Widgery v. Haskell, 5 Mass. 155. Curtis v. Hubbard, 1 Hill. (N. Y.) 336, and People v. Hubbard, 24 Wen. 369, follow Ilsley v. Nichols.

Although an officer, by taking exclusive possession of the building and excluding the owner, might be regarded as a trespasser *ab initio* as respects the owner, yet the attachment is valid; Newton v. Adams, 4 Vt. 437.

Sheriff, having gained admission, is justified in afterward breaking inner doors.

Lee v. Gansell, Cowp. 1; Lofft. 374; Lloyd v. Sandilands, 8 Taunt. 250; R. v. Bird, 2 Show. 87; Hutchinson v. Birch, 4 Taunt. 620; State v. Thackam, 1 Bay. (S. C.) 358. The sheriff may break the inner doors after peaceable entry, if the defendant is not in at the time, but he must first demand admittance, Ratcliffe v. Burton, 3 B. & P. 223; but he must not use unnecessary violence toward any one who resists him, 2 Har. (Del.) 494; he may use necessary violence in serving subpæna, Hager v. Danforth, 20 Barb. (N. Y.) 16. Where a building is occupied by several tenants having common entrance, a peaceable entry through an outer door will not justify breaking the door of either tenement, Swain v. Mizner, 8 Gray 182; see Stedman v. Crane, 11 Met. 295.

Breaking and entering the buildings of strangers.

A sheriff may, after demand for admittance and after refusal

by the occupant, break open a stranger's house in order to arrest the defendant or to attach his property; Lee v. Gansel, Cowp. 1; Lofft. 374; Douglass v. State, 6 Yerg. (Tenn.) 525; or his store, Fullerton v. Mack, 2 Aiken (Vt.) 415; Platt v. Brown, 16 Pick. 553; Burton v. Wilkinson, 18 Vt. 186; Fullam v. Stearns, 30 Vt. 443. In Oystead v. Shed, 13 Mass. 520, it was decided that an officer could not lawfully break the outer door of a dwelling-house to arrest a lodger on a capias, and the decision was put upon the ground that a boarder is an inmate of the family, and entitled to the same protection as the owner of the house.

Sheriff's risk in entering third person's house.

It appears from the principal case that the sheriff may justify. after request made, the breaking open of a third person's house, in order to execute a process of the law upon the defendant or his property, if they are there to prevent lawful execution, and to escape the ordinary process of law; but he acts at his peril, for if the defendant is not in the house and has no property there, the sheriff is a trespasser; Johnson v. Leigh, 1 Marsh. 565; 6 Taunt. 246; Ratcliffe v. Burton, 3 B. & P. 229. See Hutchinson v. Birch, 4 Taunt. 627; White v. Wilshire, Palm. 52; 2 Rolle. 138; Biscop v. White, Cro. Eliz. 759. In Cooke v. Birt, 5 Taunt. 765, Dallas, J., remarks, "The sheriff may enter the house of a stranger if the door be open; but it is at his peril whether the goods be found there or not; if they be not, he is a trespasser." In Morrish v. Murray, 2 D. & L. 199; 13 M. & W. 52; 13 L. J. Exch. 261, it was held that an officer with a ca. sa. against the debtor was not justified in entering the house of a stranger, although he reasonably suspected the defendant was there, when in fact she was not. If the defendant were on a visit, the dwelling-house of his host would seem to be, for the time, the defendant's dwelling-house. See Sheers v. Brooks, 2 H. Bl. 120, where it was held that when the defendant resided in the house of a stranger the bail above might justify entering it, in order to seek for him, the outer door being open; and Lord Loughborough put it upon the ground that there was no difference between a house solely possessed and a house in which one resides by the consent of another. As to an implied license to the sheriff to enter, see Price v. Harwood, 3 Camp. 108; Walker v. Wiloughby, 6

Taunt. 530. For other cases of illegal seizure or distress, see De Gondouin v. Lewis, 10 A. & E. 120; Ockford v. Freston, 6 H. & N. 466; S. C., 30 L. J. Exch. 89; Bateman v. Freston, 30 L. J. Q. B. 133; Lucas v. Nockells, 3 M. & Scott 627; 10 Bing. 157; 2 Y. & J. 304; in Dom. Proc. 1 C. & F. 438; Bean v. Hubbard, 4 Cush. 85; Davlin v. Stone, Ib. 359; Prell v. McDonald, 7 Kans. 426; Barrett v. Price, 9 Bing. 556.

CALYE'S CASE.

PASCH. 26 ELIZ. - IN THE KING'S BENCH.

[REPORTED 8 COKE, 32.]

Liability of Innkeepers.

It was resolved, per totam curiam, that if a (a) man comes to a common inn, and delivers his horse to the hostler, and requires him to put him to pasture, which is done accordingly, and the horse is stolen, the innholder shall not answer for it: for the words of the writ which lieth against the hostler are Cum secundum legem et consuetud' regni nostri Angliæ (b) hospitatores qui hospitia com' tenent ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes, eorum bona et catalla infra hospitia illa existentia absque subtractione seu amissione custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum seu servientium suorum hospitibus hujusmodi damnum non eveniat ullo modo, quidam malefactores quendam equum ipsius A. precii 40s. infra hospitium ejusdem B., &c, inventum pro defectu ipsius B. ceperunt, &c. Vide Registr. fol. 105. inter Brevia de Transgr' and F. N. B. 94, a. b., by which original writ (which is in such case the ground of the common law) all the cases concerning hostlers may be decided. For, 1, It ought to be a (c) common inn; for if a man be lodged with another (who is not an innholder) upon request, if he be robbed in his house by the servants of

⁽a) 1 Roll. 3, 4; 4 Leon. 96; 2 Brownl. 255.

⁽b) Plowd. 9. b; the Register is false printed, scilicet, Distractione pro subtractione. F. N. B. 94, a. & b. Book

of Entries, tit. Hosteler, f. 366 & 377; 1 And, 29; 3 Keb. 73; Dyer, 266, b.

⁽c) 1 Roll. 2 d. 1; Dr. & Stud. 137. b; Hob. 245.

him who lodged him, or any other, he shall not answer for it; for the words are hospitatores qui com' hospitia tenent, &c. And so are the books in (a) 22 Hen. 6, 21. b. (b) 38. (c) 2 Hen. 4. 7. b. (d) 11 Hen. 4, 45, a. b. (e) 42 Ass. pl. 17. (f) 42. E. 3. 11. a. 10 El. (g) Dyer, 266; 5 Mar. Dyer, 158 (h). And the writ need not mention that the defendant keeps commune hospitium, for the words of the writ in the Register are infra hospitium ejusdem B., but it is to be so intended in the writ; for the recital of the writ is, hospitatores qui communia hospitia tenent, &c., and the one part ought to agree with the other, and the latter words depend on the other, and the plaintiff ought to declare that he keeps commune hospitium: and so the said books in (i) 22 Hen. 6, 21 (j) 11 Hen. 4, 45. a. b. 10 Eliz. Dyer (k) 266, &c., are well reconciled.

- 2. The words are ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes; by which it appears that common inns are instituted for passengers and wayfaring men; for the Latin word for an inn is, diversorium, because he who lodges there is quasi divertens se a viâ; and so diversorium. And therefore, if a (l) neighbor, who is no traveller, as a friend, at the request of the innholder lodges there, and his goods be stolen, &c., he shall not have an action; for the writ is ad hospitandos homines, &c., transeuntes in eisdem hospitantes, &c.
- 3. The words are, eorum bona et catalla infra hospitia illa existentia, &c. So that the innholder, by law, shall answer for nothing that is out of his inn, but only for those things which are infra hospitium. And because the horse which at the request of the owner is put to pasture is not infra hospitium, for this reason the innholder is not bound by law to answer for him, if he be stolen out of the pasture; for the thing with which
- (a) Fitz. Hosteler, 2; Br. Action sur le Case, 58.
- (b) 22 Hen. 6, 38. b; Fitz. Hosteler,1. B, Action sur le Case, 59.
- (c) Fitz. Hosteler, 4; Br. Action sur le Case, 28; Br. Action sur le Statute, 39.
- (d) Br. Action sur le Case, 41; Br. General Brief, 16; Fitz. Hosteler, 5.
- (e) Br. Action sur le Case, 86; Palm.523; 1 Roll. 3.
 - (f) Fitz. Hosteler, 6; Br. Action sur

- le Case, 15; Statham, Action sur le Case, 6.
- (g) Dyer, 266, pl. 9; Postea, 33 a; 3 Keb. 73.
- (h) Dyer, 158, pl. 52; 1 And. 29, 30; 3 Keb. 73; 1 Roll. 3, 4.
- (i) Antea, 32. a; Fitz. Hosteler, 2; Br. Action sur le Case, 58.
- (j) 1 Roll. 4; Br. Action sur le Case, 41; Br. Gen. Brief, 15; Fitz. Hosteler, 5.
 - (k) Dyer, 226. pl. 9; 3 Keb. 73.
 - (l) 1 Roll. 3. E. 4; 2 Brownl. 254.

the hostler shall be charged ought to be infra hospitium; and therewith agree the books in (a) 11 Hen. 4, 45, a. b. 22 Hen. 6, 21, b. 42 E. 3, 11 a. b. 42 Ass. pl. 17, where Knivet, C.J., saith, that the innholder is bound to answer for himself, and for his family, of the chambers and stables, for they are infra hospitium: and with this resolution in this point agreed the opinion of the Justices of Assize (viz., the two Chief Justices, Wray and Anderson) in the county of Suffolk in Lent vacation, 26 Eliz. — that an (b) innholder lodges a man and his horse, and the owner requires the horse to be put to pasture, and there he is stolen, the innholder shall not answer for him. (c) But it was held by them, that if the owner doth not require it, but if the innholder of his own head puts his guest's horse to grass, he shall answer for him if he be stolen, &c. And it is to be observed, that this word hestler is derived ab hostle; and hospitator, which is used in writs for an innholder, is derived ab hospitio, and hospes est quasi hospitium petens.

4. The words are ita quod pro defectu hospitator', seu servientium suorum, &c., hospitibus hujusmodi damn' non eveniat, &c., by which it appears that the innholder shall not be charged, unless there be a default in him or his servants, in the well and safe keeping and custody of their guest's goods and chattels within his common inn; for the innkeeper is bound in law to keep them safe without any stealing or purloining; and it is no excuse for the innkeeper to say, that he delivered the (d) guest the key of the chamber in which he is lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guest there in safety; and therewith agrees 22 Hen. 6, 21 b.; 11 Hen. 4, 45 a. b.; 42 Edw. 3, 11 a. although the guest does not deliver his goods to the innholder to keep, nor acquaints him with them, yet if they be carried away, or stolen, the innkeeper shall be charged, and therewith agrees 42 Edw. 3, 11 a. And although they who stole or carried away the goods be unknown, yet the innkeeper shall be charged. 22 Hen. 6, 38; 8 R. 2, Hostler 7; Vide 22 Hen. 6, 21. But if the guest's servant, or he who (e) comes with him,

⁽a) 1 Roll. 4. (d) Moor, 78. pl. 207; 158. pl. 299; (b) 1 Roll. 3, 4; 4 Leon. 96; 2 2 Brownl. 255.

Brownl. 255. (e) Cro. El. 285.

⁽c) 1 Roll. 3, 4; 4 Leon. 96; 2 Brownl. 225.

or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for there the fault is in the guest to have such a companion or servant; and the words of the writ are, pro defectu hospitator' seu servientium suorum. Vide 22 Hen. 6, 21. b. But if the innkeeper appoints one to lodge with him, he shall answer for him as it there appears. The innkeeper (a) requires his guest that he will put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not, the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not (b) be charged, for the fault is in the guest, as it is held 10 Eliz. Dyer, 266.

5. The words are hospitibus damnum non eveniat; these words are general, and yet forasmuch as they depend on the precedent words they will produce two effects, viz., 1. They illustrate the first words. 2. They are restrained by them: for the first words are, eorum bona et catal' infra hospitia illa existentia absque subtractione custodire, &c., which words (bona et catalla) by the said words ita quod, &c., hospitibus damnum non eveniat, although they do not of their proper nature extend to (c) charters and evidences concerning freehold or inheritance, or (d) obligations, or other deeds or specialities, being things in action, yet in this case it is expounded by the latter words to extend to them (e); for by them great damages happen to the guest; and therefore if one brings a bag or chest, &c., of evidences into the inn, or obligations, deeds, or other specialities, and by default of the innkeeper they are taken away, the innkeeper shall answer for them, and the writ shall be bona et catalla generally; and the declaration shall be special. 3. These words, bona et catalla, restrain the latter words to extend only to movables: and therefore, by the latter words, if the guest be beaten in the inn the innkeeper shall not answer for it; for the injury ought to be done to his movables, which he brings with him; and by the words of the writ, the innholder ought to keep the goods and chattels of his guest, and not his person; and yet in such case of battery, hospiti damnum evenit, but that is restrained by the former words, as hath been said. And these words aforesaid, absque subtractione seu amissione,

⁽a) Moor, 158.

⁽b) Vide Salk. 19.

⁽c) 2 Roll. 58; 22 E. 4. 12. a. b.

⁽d) Dy. 5 pl. 2; 2 Roll. 58; Yelv. 68.

⁽e) Threfall and Borwick: L. R. 7

Q. B. 711 & 10 Q. B. 210.

extend to all movable goods, although of them felony cannot be committed; for the words are not absque felonica captione, fro., but absque subtractione, which may extend to any movables, although of them (a) felony cannot be committed, as of charters, evidences, obligations, deeds, specialities, &c.

(If a horse is at livery, and eats more than he is worth, an action lies against the owner; but the horse cannot be used or sold, Moore, 876, 877; but by the custom of London and Exeter the horse may be sold; but see Popham, 127, Robinson v. Waller.) (b)

This is the leading case upon the subject of the liabilities of innkeepers in respect of their guests' property. [Those liabilities have been diminished by a statute passed in 1863 "respecting the liability of innkeepers, and to prevent frauds on them," the 26 and 27 Vict. c. 41. This act saves them from liability to make good to any guest of theirs "any loss of or injury to goods or property, brought to their inns, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than 30l., except: (1) where such goods or property shall have been stolen, lost, or injured, through the wilful act ('wilful' applies to 'act' only, not to subsequent words, Squire v. Wheeler, 16 L. T. 93), default, or neglect of such innkeeper, or any servant in his employ: (2) where such goods or property shall have been deposited expressly for safe custody with such innkeeper;" provided that in case of such deposit they may require as a condition of their liability that the property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing it (s. 1). By sect. 2, they are not to have the benefit of the act in respect of property which they refuse to receive for safe custody, or which, by their default, the guest is unable to deposit with them. Sect. 3 requires them to cause at least one copy of sect. 1, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to the inn, and gives them the benefit of the act only in respect of goods brought to the inn while the copy is so exhibited. Where the copy hung up omitted the word "act" after wilful, it was held that the innkeeper was not protected, Spice v. Bacon, 2 Ex. D. C. A. 463; 46 L. J. Ex. 713. Sect. 4 interprets "inn" and "innkeeper."

In a case subsequent to Calye's] goods belonging to a factor were lost, out of a private room in the inn, chosen by the factor for the purpose of exhibiting them to his customers for sale, the use of which was granted to him by the innkeeper, who, at the same time, told him that there was a key, and that he might lock the door, which the guest, however, neglected to do, although on two occasions, while he was occupied in showing part of the goods to a customer, a stranger had put his head into the room. The judge, Richards, C. B., told the jury that primâ facie the innkeeper was answerable for the goods of his guest in his inn, but that the guest might, by his own conduct, discharge him from re-

⁽a) 3 Inst. 109; 10 E. 4. 14. a.; Fitz. Endict. 19; Br. Coron. 155. But see now the Larceny Consolidation Act, 24 & 25 Vict. c. 96, sects. 1, 27, 29, and 30.

⁽b) And see 41 & 42 Vict. c. 38, infra.

sponsibility, and left it for them to say whether he had done so here: the jury found that he had: and, on a motion for a new trial, the court approved of the direction of the learned judge, and thought the verdict was correct. "The law," said Lord Ellenborough, "obliges the innkeeper to keep the goods of persons coming to his inn, causâ hospitandi, safely, so that, in the language of the writ, pro defectu hospitatoris hospitibus damnum non eveniat ullo modo. . . . But there may no doubt be circumstances, as where the guest, by his own misconduct, induces the loss, which form an exception to the general liability, as not coming within the words pro defectu hospitatoris. Now, let us consider, 1st, whether the plaintiff came to the inn causâ hospitandi; and, 2dly, whether by his conduct he did not induce the loss. It does not appear whether he had a sleeping-room, but I think we may presume he had, but he desires a private room up some steps in order to show his goods. Now, an innkeeper is not bound by law to find show-rooms for his guests, but only convenient lodging-rooms and lodging. As to what is laid down in Calye's Case respecting the delivery of the key to the guest, it plainly relates only to the chamber-door in which he is lodged; and I agree that if an innkeeper gives the key of the chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as innkeeper. . . .

"The cases," continues his lordship, "show that the rule is not so inveterate against the innkeeper, but that the guest may exonerate him by his fault, as if the goods are carried away by the guest's servant, or the companion whom he brings with him, for so it is laid down in Calye's Case. Now, what is the conduct of the plaintiff in this case? The innkeeper not being bound to find him more than lodging, and a convenient room for refreshment, this does not satisfy his object, but he inquires for a third room, for the purpose of exposing in it his wares to view, and introducing a number of persons over whom the innkeeper can have no check or control, and thus for a purpose wholly alien from the ordinary purpose of an inn, which is ad hospitandos homines. Therefore, the care of these goods hardly falls within the limits of the defendant's duty as innkeeper. Besides, after the circumstances relating to the stranger took place, which might well have awakened the plaintiff's suspicion, it became his duty, in whatever room he might be, to use at least ordinary diligence; and particularly so, as he was occupying the chamber for a special purpose: for though, in general, a traveller who resorts to an inn may rest on the protection which the law casts around him, yet, if circumstances of suspicion arise, he must exercise ordinary care. It seems to me that the room was not merely entrusted to the plaintiff in the ordinary character of a guest frequenting an inn, but that he must be understood as having taken a special charge of it, and that he was bound to exercise ordinary care in the safe keeping of his goods, and it is owing to his neglect, and not to the fault of his innkeeper, that the accident happened; and this was a question proper to leave to the jury." Burgess v. Clements, 4 M. & S. 306, accord. Farnworth v. Packwood, 1 Stark. 249.

So where the defendant's ostler placed the plaintiff's horse in a stable with another horse that kicked him, and the defendant to rebut the presumption of negligence gave evidence to show that the horse had been properly taken care of; the judge, Cresswell, J., told the jury that the defendant was liable, if he or his servants had been guilty of direct injury or of negligence, otherwise not; the jury found for the defendant; and the court (though they held that evidence of any damage or loss of the goods of a guest primâ facie raises a presumption of negligence in the innkeeper) considered the direction proper. Dawson v. Chamney, 5 Q. B. 164. And in Armistead v. Wilde, 17 Q. B. 261, where a cash-box easily opened had been left in the commercial room of an inn, under circum-

stances showing gross negligence in the guest, the jury were directed that gross negligence on the part of the guest would relieve the innkeeper from his commonlaw liability, and the jury having found for the defendant, on the ground that the plaintiff had been guilty of gross negligence, the verdict was upheld, Lord Campbell observing, that he doubted if it were necessary to show gross negligence. But in another case, where a traveller went to an inn with several packages, one of which was, by his desire, taken into the commercial room, into which he was shown, and the others into his bedroom, which, according to the usual practice of that inn, was the place to which goods were taken, unless orders were given to the contrary, and the package taken into the commercial room was stolen, the innkeeper was held responsible, and Holroyd, J., distinguished the case from Burgess v. Clements by saying, that there the plaintiff asked to have a room which he used for the purposes of trade, not merely as a guest in the inn. Richmond v. Smith, 8 B. & C. 9. See the explanation of this case in Armistead v. Wilde, 17 Q. B. 261.

So in *Kent* v. *Shuckard*, 2 B. & A. 803, the plaintiff and his wife, with Miss S., arrived at the defendant's inn, and took a sitting-room and two bedrooms so situated that, the door of the sitting-room being open, a person could see the entrances into both bedrooms. On the following day the plaintiff's wife went into the bedroom, and laid on the bed a reticule, which contained money, and returned into the sitting-room, leaving the door between that and the bedroom open. About five minutes afterwards she sent Miss S. for the reticule, which was not to be found. The innkeeper was held responsible for it, and it was held that there was no distinction between money and goods as to the liability of innkeepers.

So when the plaintiff drove his gig to the defendant's inn on Bewdley fair-day, and asked whether there was room for the horse, the ostler of the defendant took the horse out of the gig and put him into a stable, and the plaintiff carried his coat and whip from the gig into the house, and took some refreshment there, the ostler placed the gig outside of the inn-yard, in a part of the open street in which the defendant was in the habit of placing the carriages of his guests on fair-days. The gig was stolen thence; and the court held the innkeeper responsible, for it did not appear that the defendant put the gig in the street at the request or instance of the plaintiff: the place was, therefore, a part of the inn, for the defendant by his conduct treated it as such. If he wished to protect himself, he should have told the plaintiff that he had no room in his yard, and that he would put the gig in the street, but could not be answerable for it. Jones v. Tyler, 1 A. & E. 522.

[It is not necessary in order to exonerate the innkeeper that he should establish that the guest was guilty of gross negligence (if this term is used in the sense of greater negligence than the mere want of ordinary care); the innkeeper is not liable if the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man might be reasonably expected to take under the circumstances. See the judgment of the Court of Queen's Bench in Cashill v. Wright, 6 E. & B. 891.

In Morgan v. Ravey, 6 H. & N. 265, the plaintiff was staying at the Great Northern Railway Hotel, London. In his bedroom was hung up a notice, that, in consequence of several robberies having taken place at night in London hotels, the proprietor requested visitors to bolt their bedroom doors, and leave their valuables at the bar, otherwise he would not be responsible. This notice plaintiff saw, but swore he only read the word "notice." He did not bolt his bedroom door (because, as he said, he did not know how), nor did he leave his

gold watch and ring and other valuables at the bar; and next morning they were gone, and the jury at the trial of an action for the loss having found that there was no negligence on his part, the court refused to disturb the verdict. The court in this case distinguished and explained Dawson v. Channey, supra, and laid down that the innkeeper is liable where there is a loss not arising from the guest's negligence, the act of God, or the Queen's enemies. According to the register he is only liable "pro defectu," but it will be observed that his duty is stated there to be "absque subtractione seu amissione custodire die et nocte." And see Oppenheim v. White Lion Hotel Co., L. R. 6 C. P. 515; 40 L. J. C. P. 281; Herbert v. Markwell, 45 L. T. 649; C. A. W. N. 1882, 112.

In Angus v. M'Lachlan, 23 Ch. D., at p. 336; 52 L. J. Ch. p. 590, Kay, J., is reported to have held that an innkeeper was not bound to be more careful in keeping the goods of his guest than he was as to his own. It is probable, however, that the report, which on this point is obviously not complete, is inaccurate in attributing to the learned judge a view which is clearly inconsistent with the authorities above cited.]

It is not necessary, in order that a man may be a guest, so as to fix the innkeeper with this sort of liability, that he should have come for more than a temporary refreshment, Bennett v. Mellor, 5 T. R. 273 [but see Strauss v. County Hotel Co., 12 Q. B. D. 27; 53 L. J. Q. B. 25; and in York v. Grindstone, 1 Salk. 388, 2 Lord Raym. 860, three judges held, against Lord Holt's opinion, that if a traveller leave his horse at an inn, and lodge elsewhere, he is, for the purpose of this rule, to be deemed a guest; "because," said they, "it must be fed, by which the innkeeper hath gain; otherwise if he had left a dead thing." But it is clear that if the innkeeper receive goods as a bailee, and not in the character of an innkeeper, they do not fall within it. Hyde v. Mersey and Trent Navigation Company, 5 T. R. 389; Jelly v. Clarke, Cro. Jac. 188; Bac. Abr. Inns, C. 5; Williams v. Gesse, 3 Bing. N. C. 849. The length of time for which the guest has resided seems not to affect his right as such, provided he live there in the transitory condition of a guest. But if he came on a special contract to board and lodge there, the law does not consider him a guest, but a boarder, Bac. Abr. Inns, C. 5; Parkhurst v. Foster, Salk. 388. [But see Threfall v. Borwick, where this point was not taken, L. R. 7 Q. B. 711.] And in Smith v. Dearlove, 6 C. B. 132, where an innkeeper received a carriage and horses to stand at livery, the circumstances that afterwards, whilst they were there, the owner took occasional refreshment at the inn, and also for a time had a friend supplied with lodging and refreshment there on his credit, were held insufficient to give the innkeeper a lien on the carriage and horses for his charges, since that right depends upon the fact that the goods come into the innkeeper's "possession in his character of innkeeper as belonging to a guest."

The definition of an inn is "a house where the traveller is furnished with everything he has occasion for while on his way." Thompson v. Lacy, 3 B. & A. 283; see Bac. Abr. Inns, B.; Burn's Justice, title Alehouse. But a mere coffee-house is not an inn, at least not within the meaning of a fire policy, Doe v. Laming, 4 Camp. 77; nor is a boarding-house, Dansey v. Richardson, 3 E. & B. 144. [Nor a refreshment bar attached to a hotel, but entered from the street by a separate door. Reg. v. Rymer, 2 Q. B. D. 136; 46 L. J. M. C. 108. As to lodging-houses, see Holder v. Soulby, 8 C. B. N. S. 254.]

As to the duties of innkeepers in receiving guests, &c., see Fell v. Knight, 8 M. & W. 269; R. v. Ivens, 7 C. & P. 213; Hawthorn v. Hammond, 1 Car. & Kir. 404. [Reg. v. Rymer, ubi sup.]

As to the lien of innkeepers for their charges, it is now decided that it attaches to goods brought to the inn by a guest, though they be not his own. Robinson v. Waller, 3 Bulst. 269; 1 Roll. Rep. 449 n., S. C.; Johnson v. Hill, 3 Stark. 172; Turrill v. Crawley, 13 Q. B. 197; Snead v. Watkins, 1 C. B. N. S. 267. [And extends to articles brought with him by the guest as his own, but which (as for instance a piano) are not ordinary traveller's luggage. Threfall v. Borwick, L. R. 7 Q. B. 711; Cam. Scac. L. R. 10 Q. B. 210; 44 L. J. Ex. 87. But not to goods the property of a third person sent to the guest in the inn for temporary use, e. g., a piano upon hire. Broadwood v. Granara, 10 Exch. 417. His lien upon the carriage and horses brought with him by his guest is not limited to his charge for the keep of the horses and care of the carriage, but extends to his charge for the guest's entertainment. Mulliner v. Florence, 3 Q. B. D. 484; 47 L. J. Q. B. 700, C. A. Occasional absences animo revertendi during a long stay will not defeat the lien, Allen v. Smith, 12 C. B. N. S. 638; see also with Day v. Bather, 2 H. & C. 14, where the plaintiff left his horse at an inn and went away for a fortnight, and a third person during that time having driven the horse out and injured it, the innkeeper was held liable for the injury. An innkeeper who accepts security from his guest for hotel charges does not necessarily thereby waive his common-law lien. Angus v. Maclachlan, 23 Ch. D. 330; 52

And now by 41 & 42 Vict. c. 38, The Innkeepers Act, 1878 (8th August, 1878), the landlord of any hotel, inn, or licensed public-house, shall, in addition to his ordinary lien, have the right to sell by auction any goods, chattels, carriages, horses, wares, or merchandise which may have been deposited with him or left in the house he keeps, or in the coach-house, stable, stable-yard, or other premises appurtenant or belonging thereto, where the person depositing such goods, &c., shall be or become indebted to the said innkeeper, either for board or lodging, or for the keep or expenses of any horse or other animals left with or standing at livery in the stable or fields occupied by such innkeeper. Provided no such sale shall be made until after the said goods shall have been for six weeks in such custody or on such premises without such debt having been satisfied, and that such innkeeper, after having, out of the proceeds of such sale, paid himself the amount of any such debt, together with the costs and expenses of such sale, shall on demand pay to the person depositing or leaving any such goods, &c., the surplus (if any remains) after such sale.

Provided that the debt for payment of which the sale is made shall not be any other or greater debt than the debt for which the goods or other articles could have been retained by the innkeeper under his lien. Provided the landlord, &c., shall one month before the sale insert in one London and one country newspaper, circulating in the district where the goods, or some of them, are deposited, notice of the intended sale, with a description of the goods, and the name of the person depositing, where known.]

The vulgar error that an innkeeper might detain the person of his guest until payment of his bill was exploded in the case of Sunbolf v. Alford, 3 M. & W. 248.

Calye's Case is a leading authority in this country as well as in England, upon the subject of the liability of innkeepers for the property of guests under their charge, and it has been often cited with approval by the courts of the various States. Innkeepers are held to a strict accountability, and are chargeable for the goods of their guests which are lost or stolen from the inn, or are damaged through the fault or negligence of themselves or their servants or other guests. This liability is imposed upon them from considerations of public policy for the security and protection of travellers.

The above rule as to the responsibility of innkeepers being generally acknowledged, it is, in applying it to particular cases, important to determine:—

1. Who is an innkeeper to whom this liability attaches. — In 5 Bac. Abr. Inns and Innkeepers (B), he is defined to be "a person who makes it his business to entertain travellers and passengers, and provide lodgings and necessaries for them and their horses and attendants." He must be the keeper of a common inn, and this is defined to be "a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary home;" Cromwell v. Stephens, 2 Daly 15, 24; and in another case as a public house of entertainment for all who choose to visit it; Wintermute v. Clark, 5 Sandf. 247.

A mere coffee-house or eating-house or restaurant is not an inn, there being no provision in any of these for lodging, Carpenter v. Taylor, 1 Hilt. 193; and on the other hand a mere lodging-house is not an inn, for the reason that it does not furnish food. And a boarding-house, though it furnish both food and lodging, is not an inn, because the guest is under an express contract, at a certain rate, for a certain period of time, and because, further, the keeper may receive or reject comers at his pleasure, Willard v. Reinhardt, 2 E. D. Smith 148. These are all, therefore, wanting in some of the requisites necessary to constitute an inn, and their keepers or proprietors are not held liable as regular innholders. And though the keeper of a boarding-house occasionally entertain transient persons, he does not thereby acquire the character or incur the responsibility of an innkeeper, either as to them or as to his boarders; Kisten v. Hildebrand, 9 B. Mon. 72. But one may be an innkeeper, and liable as such, though he have no provision for horses, or no

sign indicating his business; *Ibid*. As to who is an innkeeper, see, further, Walling v. Potter, 35 Conn. 183; Minor v. Staples, 71 Me. 316; State v. Mathews, 2 Dev. & Bat. 424; Bonner v. Welborn, 7 Ga. 296; Southwood v. Myers, 3 Bush. 681; Pinkerton v. Woodward, 33 Cal. 557. Owners of steamboats carrying passengers and goods for hire are not innkeepers; Clark v. Burns, 118 Mass. 275, and cases cited. Nor is the owner of a sleeping-car; Pullman Palace Car Co. v. Smith, 73 Ill. 360; Lewis v. N. Y. Sleeping-Car Co., 143 Mass. 267; Woodruff Sleeping, etc., Co. v. Diehl, 84 Ind. 474.

2. Who are to be considered as guests. - A guest is a traveller or wayfarer who comes to an inn and is accepted, and it is sufficient to prove that he was received without any previous agreement as to the duration of his stay or the terms of his entertainment. But it is not necessarily a traveller only who may be a guest, for a townsman or neighbor may become such as well as he who comes from a distance or from a foreign country. Wintermute v. Clark, supra; Walling v. Potter, supra. But if a neighbor comes to an inn on the invitation of the innkeeper he is not deemed a guest, nor is one who sojourns at the inn under a special contract for board; and if either is robbed, the host is not answerable for it. Norcross v. Norcross. 53 Me. 163; Manning v. Wells, 9 Humph. 746. Whether the relation of guest is created by a person putting up his horse at inn is not entirely clear. In Mason v. Thompson, 9 Pick. 280, the traveller did not go to the inn, but stopped as a visitor with a friend, and sent her horse and carriage to the inn. After four days she sent for her property, and, a part having been stolen, the innkeeper was held liable. And in Peet v. McGraw, 25 Wend. 653, it was said not to be necessary that the owner or person putting the horses to be kept at a public inn should be a guest himself in order to charge the innkeeper for any loss that may happen. But in Grinnell v. Cook, 3 Hill 485, the authority of Mason v. Thompson was denied, and in Ingalsbee v. Wood, 36 Barb. 452, and Healey v. Gray, 68 Me. 489, it was held that where one leaves his horse with an innkeeper, with no intention of stopping at the inn himself, but has his personal entertainment at the house of a relative or a friend, he is not a guest of the inn, and the liability of the innkeeper is simply that of an ordinary bailee for hire. See McDaniels v. Robinson, 26 Vt. 316.

And this relation does not cease by proposing to remain a given number of days, or by ascertaining the price that will be charged for entertainment, or by paying in advance for the whole or a part of the entertainment, or by making an agreement with the innkeeper for the price of board per week, or even by paying for what the guest has occasion for as his wants are supplied, so long as he maintains his status as a traveller. Pinkerton v. Woodward, 33 Cal. 557; Norcross v. Norcross, supra: Berkshire Woollen Co. v. Proctor, 7 Cush. 417; Hall v. Pike, 100 Mass. 495. Where a person, after he has actually become a guest, goes away for a brief period, leaving his goods behind him, he continues, during his absence, to be a guest so far as relates to the rights and liabilities of the parties. Grinnell v. Cook, 3 Hill 485; McDonald v. Edgerton, 5 Barb. 560. And although the liability of an innkeeper ceases upon the departure of the guest, yet, if the baggage of the latter be left with the innkeeper with his consent, he is liable for it for a reasonable time though he gets no additional compensation for taking care of it. Adams v. Clem, 41 Ga. 65. See Giles v. Fauntlerov, 13 Md. 126. But, in order to entitle one to the privileges of a guest at an inn, he must be there for a lawful purpose, and therefore one who registers at an inn for the purpose of having illicit intercourse cannot recover for money placed in the care of a clerk who absconded. Curtis v. Murphy, 63 Wisc. 4. See further as to who are to be deemed guests, Read v. Amidon, 41 Vt. 15; Healey v. Gray, 68 Me. 489; Mowers v. Fethers, 61 N. Y. 34; Carter v. Hobbs, 12 Mich. 52; Arcade Hotel Co. v. Wiatt, 44 Ohio St. 32; Miller v. Peeples, 60 Miss. 819.

3. What are the rights and liabilities of an innkeeper. An innkeeper is not liable for the goods of his guest unless they are received into his care and keeping within the meaning of the terms of his common-law liability, that is infra hospitium. But in order to render him liable it is not necessary that the goods be strictly within the inn, for it is settled that barns and outbuildings come within the definition: McDonald v. Edgerton, supra. Therefore, where, as in Mason v. Thompson, 9 Pick. 280, the chaise and harness were placed under an open shed enclosed by a fence, and the harness was stolen, the innkeeper was held liable. In Clute v. Wiggins, 14 Johns. 175, a load of grain was put into a wagon-house appurtenant to the inn, and, during the night, the door of the wagon-house having been

broken in and the grain stolen, the innkeeper was held responsible for the loss without proof of negligence on his part. Piper v. Manny, 21 Wend. 282.

But if, according to the principal case, the property of a guest be placed anywhere not strictly infra hospitium, at his own request, and is lost, the innholder is not responsible. Thus in Hawley v. Smith, 25 Wend. 642, it appearing that certain sheep, which were poisoned by eating laurel, had been put to pasture under the direction of the guest, the innholder was deemed to be blameless. But in Albin v. Presby, 8 N. H. 408, the court say, "As the inns in this country are not generally furnished with accommodations for the protection of the carriages of all guests who may lodge at the inn, and the custom of permitting them to remain in open yards, where they cannot be protected but by a guard, is so universal and well known, we think it a sound position that the assent of the traveller is to be presumed in such case, unless he makes a special request that his carriage should be put in a safe place; and that such open yard is not to be deemed a part of the inn, so as to charge the innkeeper for the loss, unless he neglects, upon request, to put the goods in a place of safety."

It is not necessary, in order to charge him, that the goods should be delivered into his possession or that he should be notified by the guest that they are in his house, for he is responsible for all the movable goods and chattels of his guests which are placed within the inn, and there is no distinction in respect to his liability between goods and money. Berkshire Woollen Co. v. Proctor, supra; Norcross v. Norcross, 53 Me. 163; Quinton v. Courtney, 1 Hayw. 40; McDonald v. Edgerton, 5 Barb. 560; Jalie v. Cardinal, 35 Wisc. 118; Story on Bailm., § 479; 2 Kent's Com. 593. And the innkeeper will not be permitted to relieve himself from responsibility by refusing to receive the goods of a guest into his house on the ground that there are persons therein for whose conduct he cannot be answerable. Story on Bailm., § 470. But if an innkeeper receive the goods and chattels of another, not his guest, he is not under the extraordinary liability which attaches to his calling or occupation, but is responsible only as an ordinary bailee. Ingalsbee v. Wood, supra.

With regard to the extent to which an innholder shall be held liable, some difference of opinion seems to exist. In some jurisdictions and by some text-writers it is held that innkeepers,

as well as common carriers, are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God or the common enemy, or the neglect or fault of the owner of the property: Mason v. Thompson, 9 Pick. 280; Spring v. Hager, 145 Mass. 186; Sibley v. Aldrich, 33 N. H. 553; Shave v. Berry, 31 Me. 478; Norcross v. Norcross, 53 Me. 163; Hulett v. Swift, 42 Barb. 230; Grinnell v. Cook, supra; Piper v. Manny, 21 Wend. 282; Hawley v. Smith, 25 Wend. 642; Thickstun v. Howard, 8 Blackf. 535; Manning v. Wells, 9 Humph. 746; Jalie v. Cardinal, supra; Shoecraft v. Bailey, 25 Iowa 553; 2 Kent's Com. 594. Elsewhere it is held that the innkeeper is not liable if the loss is occasioned by inevitable accident, external force, or robbery, though it may not amount to what the law denominates the act of God or the force of a public enemy: Merrill v. Claghorn, 23 Vt. 177; Kisten v. Hildebrand, 9 B. Mon. 72. Still others maintain that, though the innholder is primâ facie liable for loss, he may discharge himself by showing that the goods were not lost by his negligence or default: Metcalf v. Hess, 14 Ill. 129, following Dawson v. Chauncey; Story on Bailm., § 472. See Hill v. Owen, 5 Blackf. 323; Howth v. Franklin, 20 Tex. 798; Clary v. Willey, 49 Vt. 55.

But the first view seems to prevail, and to be supported by the weight of authority in this country: Wilkins v. Earle, 44 N. Y. 172; Fuller v. Coats, 18 Ohio St. 343; Elcox v. Hill, 98 U. S. 218, and cases cited.

And this liability is not restricted to such sums only as are necessary and designed for the ordinary travelling expenses of the guest: Berkshire Woollen Co. v. Proctor, supra; Pinkerton v. Woodward, 33 Cal. 557. The opposite view is, however, maintained in Simon v. Miller, 7 La. An. 360, and in Treiber v. Burrows, 27 Md. 130, where the cases are fully considered and discussed.

By the common law an innkeeper has a lien upon all the goods of the guest brought to the inn, for board and lodging furnished by him to the guest at the request of the latter. And this is so although the goods may not be the property of the guest, but belong to some third person, provided the innkeeper is not aware that the goods are not the property of the guest: Manning v. Hollenbeck, 27 Wis. 202; Cook v. Prentice, 34 Alb. Law Jl. 93; Jones v. Morrill, 42 Barb. 623, 626; Grinnell v.

Cook, 3 Hill 485, 490. But in Wyckoff r. Southern Hotel Co., 24 Mo. App. 382, the lien was held, under the statute of that State relating to innholders, not to extend to goods of a third person. See Alvord r. Davenport, 43 Vt. 30; Case r. Fogg, 46 Mo. 44; Domestic Sewing Machine Co. r. Watters, 50 Ga. 573.

As has been stated above, loss or damage resulting from the act of God, public enemies, or through the neglect or fault of the guest, will not subject the innkeeper to the common-law responsibility. He will, therefore, not be liable for a loss by fire which was not occasioned by the negligence of himself or his servants: Merritt v. Claghorn, 23 Vt. 177; Cutler v. Bonney, 30 Mich. 259. But in Hulett v. Swift, 33 N. Y. 571, he is, on the contrary, regarded as an insurer against fire. See Faucett v. Nichols, 64 N. Y. 377.

He is not liable where the guest takes upon himself the custody or exclusive charge of his own goods, or commits them to another person living at the inn, or where they are lost or stolen by a servant or companion of the guest, or where accommodations in the inn are furnished to a person for the purpose of carrying on business or trade: Myers v. Cottrill, 5 Biss. 465; Mowers v. Fethers, 61 N. Y. 34; Sneider v. Geiss, 1 Yeates 34; Houser v. Tully, 62 Penn. St. 92; 2 Kent's Com. Lect. 40, p. 593. Beyond these the common law admits no excuse and affords no immunity to the innkeeper for the loss of the goods of a guest happening within his inn, so long as the guest is a sojourner merely: Jalie v. Cardinal, supra.

Where there is a regulation of the inn that guests shall deposit all their money or valuables in a safe provided for that purpose, and a guest, with knowledge of such regulation, leaves a large amount of valuable jewelry in the coat-room, the inn-keeper is exonerated from liability: Elcox v. Hill, 98 U. S. 218. But a usage or custom of guests thus to deposit their valuables at the office will not exonerate the host unless the guest has knowledge of it: Berkshire Woollen Co. v. Proctor, 7 Cush. 417. Now, however, in Massachusetts a statute exonerates an innholder from his common-law liability for a loss sustained by a guest who has knowingly failed to comply with a reasonable regulation of the inn, if the loss is attributable to such noncompliance: Burbank v. Chapin, 140 Mass. 123.

In many of the States the rights and liabilities of innkeepers are now regulated and qualified by statutes.

THE SIX CARPENTERS' CASE.

MICH. - 8 JACOBI 1.

[REPORTED 8 COKE, 146a.]

If a man abuse an authority given him by the law, he becomes a trespasser ab initio. — Contra of an authority given by the party. — The abuse is good matter of replication. — Mere non-feasance does not amount to such abuse as makes a man a trespasser ab initio. (a)

In trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1 Sept. 7 Jac., in London, in the parish of St. Giles extra Cripplegate, in the ward of Cripplegate, &c., and upon the (b) new assignment, the plaintiff assigned the trespass in a house called the Queen's head. The defendants to all the trespass præter fractionem domus pleaded not guilty; and as to the breaking of the house, said, that the said house, præd' tempore quo, &c., et diu antea et postea, was a common wine tavern of the said John Vaux, with a common sign at the door of the said house fixed, &c., by force whereof the defendants, præd' tempore quo, &c., viz., horâ quartâ post meridiem, into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, &c. The plaintiff, by way of replication, did confess that the said house was a common (c) tayern, and that they entered into it, and bought and drank a quart of wine, and paid for it; but further said, that one John Ridding, servant of the said John Vaux, at the request of the said

⁽a) See 6 Mod. 70, 216; Fitzgib. 86, (b) 2 Co. 5. a; 18. b. 185. (c) Kelw. 38, a.

defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8d., and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same: upon which the defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or non-payment, which is all one (for every non-payment, upon request, is a denying in law), makes the entry into the tavern tortious. And first, it was resolved when entry, authority, or (a) license is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio; but where an entry, authority, or license is given by the (b) party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser ab initio. And the reason of this difference is, that in the case of a general authority or license (c) of law, the law adjudges by the subsequent act, quo animo, or to what intent he entered, for acta exteriora indicant interiora secreta. Vide 11 H. 4. 75. b. But when the party gives an authority or license himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or license, and therefore the law gives authority to enter into a common inn or tavern: so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle; and such like. Vide 12 E. 4. 8. b; 21 E. 4. 19. b; 5 H. 7. 11. a; 9 H. 6. 29. b; 11 H. 4. 75. b; 3 H. 7. 15. b; 28 H. 6. 5. b. But if he who enters into the inn or tavern doth a trespass as if he (d) carries away anything; or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the (e) distress; or if he who enters to see waste break the house, or (f) stays there all night; or if the commoner cuts down a tree; in these and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser ab initio, as it appears in all the said books. So if (g) a pur-

⁽a) 2 Roll. 561; Yelv. 96, 97.

⁽b) 5 H. 7. 11. a; Perk. sect. 191; Yelv. 96, 97; 21 E. 4. 19. b.

⁽c) 2 Roll. 561; 21 E. 4. 19. b; 76 b. per Catesby; Yelv. 96, 97; Perk. sect. 191; 5 H. 7. 11. a.

⁽d) Perk. sect. 119; 2 E. 4, 5; Cro. Car. 196; Yelv. 96.

⁽e) 12 E. 4. 8. b; 9 Co. 11. a; 1 And. 65; Cro. Jac. 148; Perk. sect. 191.

⁽f) 2 Roll. 561; 11 H. 4. 75. b; Fitz. Tresp. 176; Br. Tresp. 97; Br. Replica. 12.

⁽g) 2 Roll. 561; 18 H. 6. 9. b; 2 Inst. 546.

veyor takes my cattle by force of a commission, for the king's house, it is lawful; but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6. 19. b. Et sic de similibus.

2. It was resolved per totam curiam, that (a) not doing cannot make the party, who has authority or license by the law, a trespasser ab initio, because not doing is no trespass, and therefore if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser ab initio; and therewith agrees 33 H. 6. So if a man takes cattle damage-feasant, and the other offer sufficient amends, and he refuses to redeliver them, now if he sues a replevin, he shall recover (b) damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69, g. temp. E. 1. Replevin, 27; 27 E. 3. 88; 45 E. 3. 9. So in the case at bar, for not (e) paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers ab initio; and therewith agrees directly in the point (d) 12 E. 4. 9. b. For there Pigot, Sergeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To which Brian, Chief Justice, said, the said case which Pigot has put is not (e) law, for it is no trespass, but the taverner shall have an action of debt: and there before (f) Brown held, that if I bring cloth to a tailor, to have a gown made, if the price be not agreed in certain before, how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt: but the tailor in such a case shall have (g) a special action of debt; seil. that A. did put cloth to him to make a gown thereof for the said A. and that A. would pay him as much for making, and all necessaries thereto, as he should deserve, and that for making thereof, and all necessaries thereto, he deserves so much, for

⁽a) Cr. Car. 196; 2 Bulstr. 312; 1 Roll. Rep. 130.

⁽b) Lit. Rep. 34; Dr. & Stud. lib. 2 112. b; Hetl. 16.

⁽c) 1 Roll. Rep. 60; 2 Bulstr. 312.

⁽d) 1 Sid. 5; 12 E. 4. 9. a. b.

⁽e) 12 E. 4. 9. b.

⁽f) 12 E. 4. 9. b.

⁽g) 1 Sid. 5.

which he brings his action of debt: in that case, the putting of his cloth to the tailor to be made into a gown is sufficient evidence to prove the said special contract, for the law implies it: and if the tailor overvalues the making, or the necessaries to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred for the residue. But if the tailor (as they use) makes a bill, and he himself values the making, and the necessaries thereof, he shall not have an action of debt for his own value, and declare of a retainer of him to make a gown, &c., for so much, unless it is so specially agreed. But in such case he may (a) detain the garment until he is paid, as the hostler may the horse. Br. Distress, 70, and all this was resolved by the court. Vide the Book in 30 Ass. pl. 38, John Matrever's case, it is held by the court, that if the lord or his bailiff comes to distrain, and (b) before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for damage-feasant, (c) if before the distress he tenders sufficient amends; and therewith agrees 7 E. 3. 8. b. in the Mr. of St. Mark's case, and so is the opinion of Hull to be understood in 13 H. 4. (d) 17 b, which opinion is not well abridged in the title Trespass, 180. Note, reader, this difference, that tender upon the (e) land before the (f) distress makes the distress tortious; tender after the distress and before the impounding makes the detainer, and not the taking wrongful (g); tender after (h) the

(a) Hob. 42; Yelv. 67; Cro. Car. 271, 272; Br. Distress, 71; Palm. 223, Hut. 101; 22 E. 4. 49. b; Moor 877; 5 Ed. 4. 2. b; 1 Roll. Rep. 44; 2 Roll. Rep. 439; 2 Roll. 85, 928; 3 Bulstr. 269.

(b) Br. Distr. 37; Br. Tender, &c.18. [Bennett v. Bayes, 5 H. & N. 391;S. C. 29 L. J. Exch. 224.]

(c) [Singleton v. Williamson, 7 H. & N. 747; 31 L. J. Exch. 287.]

(d) 2 Roll. 561; See Anscombe v. Shore, 1 Camp. 385; 1 Taunt. 261. Replevin for taking and impounding, plea a tender after the taking and before impounding: held good, for the detaining after tender is a new taking. Erans v. Elliott, 5 A. & E. 142. [Tennant v. Field, 8 E. & B. 337.]

(e) 2 Sid. 40.

(f) 5 Co. 76. a; 2 Inst. 107.

(g) [The remedy for the detention is not confined to replevin, Loring v. Warburton, E. B. & E. 507; but see Glynn v. Thomas, 11 Exch. 870.]

(h) 2 Roll. 561; 1 Brownl. 173; 2 Inst. 107; 5 Co. 76 a. It seems to have been thought in the case of Smith v. Goodwin, 4 B. & Ad. 415, that this doctrine does not apply to the case of a distress for rent, but that a tender of the rent and charges after impounding would make the subsequent detainer tortious. In that case, however, there was a seizure, an impounding upon the premises, then a tender of the rent and charges, then a relinquishment of the distress, and then a second seizure. See Vertue v. Beasley, 1 M. & Rob. 21, Parke, B. In Thomas v. Harries, 1 M. & Gr. 695, 1 Sc. N. R. 524, Maule,

impounding makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined. (a) But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of Detinue for the detainer after: or he may, upon satisfaction made in court, have a writ for the redelivery of his goods; and therewith agree the said books in 13 H. 4. 17. b; 14 H. 4. 4. Registr' Judic', 37; 45 E. 3. 9, and all the books before. Vide 14 Ed. 4. 4. b; 2 H. 6. 12; 22 Hen. 6, 56; Doctor and Student, lib. 2, cap. 27; Br. Distress, 72. and Pilkington's Case, in the Fifth Part of my Reports, fol. 76, and so all the books, which primâ facie seem to disagree, are upon full and pregnant reason well reconciled and agreed.

From this case, which is one of the most celebrated in Lord Coke's Reports, three points are to be collected:—

1. That if a man abuse an authority given to him by the law, he becomes a trespasser ab initio.

2. That in an action of trespass, if the authority be pleaded, the subsequent abuse may be replied.

3. That a mere non-feasance does not amount to such an abuse as renders a man a trespasser ab initio.

The first of these points has been frequently confirmed. In Oxley v. Watts, 1 T. R. 12, the plaintiff sued the defendant in trespass for taking a horse; the defendant justified taking him as an estray. Replication, that, after the taking mentioned in the declaration, the defendant worked the horse, and so became a trespasser ab initio. On motion in arrest of judgment, the court held the replication good, and the defendant a trespasser ab initio. The same point, precisely, was decided in Bagshaw v. Goward, B. N. P. 81; Cro. Jac. 147, where it

J., thought that under 11 Geo. II. c. 19, s. 22, the right of tender remained as long as the distress was on the premises; but the other judges differed from him. The doctrine laid down in the Six Carpenters' Case is affirmed by Ellis v. Taylor, 8 M. & W. 415; and Ladd v. Thomas, 4 P. & D. 9; 12 A. & E. 117, S. C.; West v. Nibbs, 4 C. B. 172. [But the court of Queen's Bench has since held quite consistently with the Six Carpenters' Case, and in accordance with the prevailing opinion, though dissenting from Thomas v. Harries, Ellis v. Taylor, and Ladd

v. Thomas, that by the equity of the Statute of Wm. and Mary a tender of the rent and expenses after impounding, but within five days of the taking, renders a subsequent detention unlawful. Johnson v. Upham, 2 E. & E. 250; 28 Law J. Q. B. 252. A tender of rent without expenses after a warrant of distress has been delivered to the broker, but before its execution is good. Bennett v. Bayes, 5 H. & N. 391.]

(a) [Singleton v. Williamson, 7 H.& N. 747, but see C. L. P. Act, 1860, s.23.]

arose on demurrer; accord. Gargrave v. Smith, Salk. 221; Sir Ralph Bovey's Case, 1 Vent. 217; Aitkenhead v. Blades, 5 Taunt. 198. One consequence of this doctrine was, that, if a party, entering lawfully to make a distress, committed any subsequent abuse, he became a trespasser ab initio. In Gargrave v. Smith, Salk. 221, and Dye v. Leatherdale, 3 Wilson 20, this was expressly decided. But, if there be a seizure of several chattels, some of which are by law seizable, and some not, or some of which are subsequently abused, and the rest not, the seizure is or becomes illegal, only as to the part which it was unlawful to seize, or which was subsequently abused, and the seizure of the rest continues legal; Dod v. Monger, 6 Mod. 215; Harvey v. Pocock, 11 M. & W. 740. As it was found, however, that this doctrine of trespass ab initio bore extremely hard on landlords; to relieve them, stat. 11 Geo. 2, c. 19, s. 19, provided, that where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser ab initio; but the party grieved may recover satisfaction for the damage [and no more] in a special action of trespass or on the case, at the election of the plaintiff, and, if he recover, he shall have full costs.

[If an entry was so made as to render the seizure wholly illegal *ab initio*, the measure of damage will be the whole value of the goods, without deducting the rent satisfied by the seizure. *Attack* v. *Bramwell*, 3 B. & S. 520; 32 L. J. Q. B. 146.]

By 17 G. 2, c. 38, s. 8, where any distress shall be made for money justly due for the relief of the poor, the party distraining shall not be deemed a trespasser ab initio, on account of any act subsequently done by him; but the party grieved may recover satisfaction for the special damage in an action of trespass or on the case, with full costs, unless tender of amends is made before action brought. [There are like provisions in the General Highway Act, 5 & 6 Will. 4, c. 50, s. 104; and the Public Health Act, 1848, 11 & 12 Vict. c. 33, s. 131. To support an action for irregularity, actual damage must be proved. Rogers v. Parker, 18 C. B. 112; Lucas v. Tarleton, 3 H. & N. 116.]

It has been held that the sheriff, if indeed he be a trespasser at all, is not at all events so *ab initio*, on account of his detaining a prisoner who came into his custody lawfully beyond the time at which, according to the practice of the court as regulated by statute (but of the applicability of which to the plaintiff's case it was not averred the sheriff had notice), he ought to have been detained. In that case a distinction was drawn by Littledale, J., between cases in which the excess may have been contemplated at the time of the original act, and those in which it could not possibly have been so. Smith v. Egginton, 7 A. & E. 167. See Magnay v. Burt, 5 Q. B. 381 [Ash v. Dawnay, 8 Exch. 237.

The note upon the 2d point decided in the principal case has been omitted, in view of the recent alterations in the whole system of pleading.]

As to becoming a trespasser, ab initio by non-feasance, see the dieta in Jacobson v. Blake, 6 M. & Gr. 925, 7 Scott, N. R. 772. In West v. Nibbs, 4 C. B. 172, it was held that a landlord who accepted the rent in arrear, and expenses, after impounding a distress, and then retained possession of the goods distrained, was only guilty of a non-feasance, and therefore not a trespasser ab initio, though he might be liable for a conversion of the goods to his own use; and Evans v. Elliot, 5 Ad. & E. 142, was distinguished on the ground that it was an action of replevin, as was also Vertue v. Beasley, 1 M. & Rob. 21, Parke, B., on the ground that in that case there was a removal of the goods after the tender.

[Akin to the subject-matter of this note is the second point mentioned in the head note to *Taylor* v. *Cole*, 3 T. R. 292, which appeared as a leading case in some former editions of this work, viz.:—

"A person having a right of possession may enter peaceably, and being in possession may retain it without first establishing his right by action. If the assertion of his right be accompanied by a breach of the peace, that is the proper subject of criminal prosecution."

This point is one of general importance, and has given rise to a difference of opinion in the Court of Common Pleas, Newton v. Harland, 1 M. & Gr. 644, though it is believed that the almost universal opinion of the profession has been in accordance with the doctrine above stated, and the opinion of the very learned judge, Mr. Justice Coltman, who dissented from the majority of the court in Newton v. Harland. See further upon this subject [Turner v. Meymott, 1 Bing. 158; Wilbor v. Rainforth, 8 B. & C. 4; and Perry v. Fitzhowe, 8 Q. B. 757, where a commoner, without notice or request to remove, pulled down an inhabited house, on the ground that it interfered with his common, and was held not to be justified [acted on in Jones v. Jones, 1 H. & C. 1; S. C. 31 L. J. Exch. 506]; Davies v. Williams, 16 Q. B. 546, where the same course, after notice and request to remove the house, was held to be justifiable; Davison v. Wilson, 11 Q. B. 890, where a declaration, stating that the defendant, with force and arms, and with a strong hand and against the form of the statute, &c., broke and entered the plaintiff's dwelling-house, in his actual occupation, &c., and in a forcible manner, and with a strong hand, broke open the doors, broke the locks, &c., was held to be well answered by a plea that the dwelling-house was the dwelling-house, soil, and freehold of the defendant; Burling v. Read, 11 Q. B. 904, where the defendant justified pulling down his workshop in the actual occupation of the plaintiff; Harvey v. Brydges, 14 M. & W. 437, affirmed in error, 1 Exch. 261 [and Delaney v. Fox, 1 C. B. N. S. 166. See also Blades v. Higgs, 10 C. B. N. S. 713; S. C., 30 L. J. C. P. 347, where Harvey v. Brydges was treated as an overruling authority as to the taking possession of land, and the principle of it was applied to the retaking of chattels. And see, as to recaption, Patrick v. Colerick, 3 M. & W. 483.

In Beddall v. Maitland, 17 Ch. D. 174, 50 L. J. Ch. 401, Fry, J., followed Newton v. Harland, and held upon a review of the authorities that possession obtained by a forcible entry would not justify any act which could be justified only by lawful possession, and that therefore a person who, being entitled to possession, had obtained it by means of a forcible entry, could not justify the removal of furniture belonging to the trespasser whom he had expelled, although the removal was carried out in such a manner as to be justifiable, had possession been obtained otherwise than by a forcible entry. He treated the observations on Newton v. Harland of Barons Parke and Alderson in Harvey v. Brydges as the dicta of judges who had tried the case and been overruled by the court in Banc. The learned judge's attention, however, seems not to have been drawn to Blades v. Higgs, in which the court, in a considered judgment delivered by Erle, C. J., adopt in terms the remarks of Parke, B., in the former case, and apply them in holding an owner of chattels justified in taking them from a wrongdoer by means of an assault. In Edwick v. Hawkes, 18 Ch. D. 199, 50 L. J. Ch. 577, Fry, J., again acted upon the same view of the law.]

Trespass ab initio.

If the defendant in an action of trespass admits the doing of the act complained of as a trespass, and that such act amounts in law to a trespass, giving the plaintiff a primâ facie right of action, he may still defend by affirmatively pleading and proving that in doing such act he was acting either on the one hand under an authority given him by the law, or on the other under a license from the owner, Lockhart v. Geir, 54 Wisc. 133; Rutherford v. Davis, 95 Ind. 245; Snell v. Crowe, 3 Utah 26; Womack v. Bird, 51 Ala. 504; S. C., 63 Id. 500. In this event he must show.—

- (1) That the authority or license in fact existed.
- (2) That he was acting under the authority or license in doing the act complained of.

If he shows the existence of his authority or license, and that his act was justified by it, it will ordinarily be presumed that he was acting under it.

In order to show that his act was justified by his authority or license, he must show the nature and extent of the authority or license he possessed. It may appear that his authority or license was either (a) general, i. e. an absolute authority or license to do the act complained of as an end in itself without regard to any special object or purpose in doing it, and without any specific limitations as to the manner in which it should be exercised; or (b) special, i. e. a limited authority or license to do the act complained of, not as an end in itself, but as a means of accomplishing some object which alone forms the reason for the giving of the authority or license, or an authority or license to do the act only in a specified manner.

General authority given by the law. — In the case of a general authority given by the law, as in all other cases, it will be open to the plaintiff to rebut any presumption that the defendant was acting under his authority, and to show that he was not in fact acting under it at all, but was acting with a wholly different purpose; for while it is true that the intent with which a tortious act is done is not ordinarily material, such intent is material as showing that the defendant was not in fact acting under an authority he possessed, and so cannot avail himself of it as a justification. Abbott v. Wood, 13 Me. 115. But if the defendant intends to act and does act under his authority, it is not material that he has also malicious motives, or even that he is induced by malicious motives to exercise his authority; Morrison v. Howe, 120 Mass. 565.

If, in the case of a general authority given by the law, it be

assumed that the defendant began to act under his authority, but afterwards abused or even abandoned it, his authority will still be a good defence for his acts up to the time when he abused or abandoned the authority under which he acted.

Hence it has been held that undue force used in ejecting the plaintiff from premises from which defendant had the right to eject him will not deprive the defendant of his justification for acts done up to the time of the abuse of his authority; Esty v. Wilmot, 15 Gray 168. See also Buzzell v. Johnson, 54 Vt. 90. The same has been held as to use of excessive force in self-defence; Turner v. Footman, 71 Me. 218.

General license from the owner. — If the defendant shows that he acted under a general license from the owner to enter upon or take his property, such license will be a good defence to an action of trespass for such entry or taking. This will still be so even though it appear that the defendant subsequently committed tortious acts against the property: Hunnewell v. Hobart, 42 Me. 565; provided such acts do not go to the extent of showing that the original entry or taking was not under the license.

Thus, where plaintiff granted defendant a right of way over his land in consideration of an agreement to build a depot upon it, the license was general, and the failure to keep the promise was held not to make the defendant a trespasser *ab initio*, viz. not to deprive him of the benefit of the license as a defence to an action of trespass for the original entry; Hubbard v. K. C., St. Jo. & C. R. R. R. Co., 63 Mo. 68.

So also of an entry into plaintiff's house by permission, followed by wrongful acts to property therein; Smith v. Pierce, 110 Mass. 35. See also Dumont v. Smith, 4 Den. 319; Allen v. Crofoot, 5 Wend. 506.

In Leach v. Kimball, 34 N. H. 568, it was held that a mort-gagee in possession, selling wrongfully, was not thereby made a trespasser from the time of his original entry.

Of course in the case of a general license from the owner, as also in the case of a general authority given by the law, it would seldom, if ever, be possible to show that the defendant was not acting under his license or authority.

Limited license from the owner. — In the case of a license from the owner to enter upon or take property in a particular manner, or for a particular purpose, it is competent, as in other cases, for the plaintiff to show that the defendant, in entering upon or taking the property, was not acting under the license which he had, thereby negativing the truth of one part of the defendant's justification.

Hence, where the defendant had a right of way over plaintiff's land to a certain lot of his own, but passed over to go to and from another lot of land, as to which he had no such right, held that his entry was without justification; Davenport v. Lamson, 21 Pick. 72.

So where defendant, having a right to enter and take certain property, entered and took other property; Holly v. Brown, 14 Conn. 255, 270. See also Ganley v. Looney, 14 Allen 40; Abbott v. Wood, 13 Me. 115.

So where defendant obtained property ostensibly to take it to one place, but really to take it to another, and allow it to be attached as his own; Joplin v. Carrier, 11 S. C. 327. See Wilt v. Welsh, 6 Watts 9, with which compare Freeman v. Boland, 14 R. I. 39.

A limited right to enter upon or take property implied from a contract between the parties would seem to be a license from the owner, as it rests upon presumed intention; Ballard v. Noaks, 2 Ark. 45. But it was regarded as an authority given by the law in Daniels v. Brown, 34 N. H. 454; Lyford v. Putnam, 35 N. H. 563. In the latter case, however, it seems, the decision would be the same in either view. It was a case of an implied license to enter and cut certain kinds of lumber. The defendant entered and cut lumber of other kinds, as to which he had no license.

But, if it be assumed that the original entry or taking was under the license, subsequent wrongful acts upon or against the property will not avoid the effect of the license as a justification for the original entry or taking, though the defendant will be liable in a proper form of action for such wrongful acts; Cushing v. Adams, 18 Pick. 110; Bradley v. Davis, 14 Me. 44 (failing to return or pay for goods as agreed); Narehood v. Wilhelm, 69 Penn. St. 64 (cutting more timber than license allowed); Boults v. Mitchell, 15 Id. 371; Edelman v. Yeakel, 27 Id. 26; Jewell v. Mahood, 44 N. H. 474; Dingley v. Buffum, 57 Me. 379; Stone v. Knapp, 29 Vt. 501; Ballard v. Noaks, 2 Ark. 45.

In Walsh v. Taylor, 39 Md. 592, the defendant was held to have had an irrevocable license to enter and do the acts he did.

Limited authority given by the law. — In the case of a limited authority given by the law, if the existence of such an authority be admitted, it may still appear: —

- (1) That the defendant, in entering upon or taking the plaintiff's property, was not acting within the terms of his authority. In this case the defendant shows no justification for his entry or taking; Cowell v. Martin, 43 Cal. 605; Juchter v. Boehm, 67 Ga. 534; Whitney v. Jenkinson, 3 Wisc. 407.
- (2) That, though acting within the terms of his authority, he was not in fact acting under it.

This also amounts in the end to a failure by the defendant to show any justification for his entry or taking. But as the defendant would show a primâ facie justification by proving his authority and that his entry or taking was justified by the authority, it would be left for the plaintiff to rebut this primâ facie case, by showing that the defendant was not really acting under his authority; and ordinarily the plaintiff could most easily do this by showing that the conduct of the defendant, after the entry or taking, was such as to indicate that he was not acting under his authority, but for another purpose. is stated as the ground of the decision in the principal case, and in many cases is regarded as the controlling principle upon the subject; Stone v. Knapp, 29 Vt. 501; Grafton v. Carmichael, 48 Wisc. 660; Faulkner v. Alderson, Gilmer (Va.) 221; Closson v. Morrison, 47 N. H. 482; Whitney v. Jenkinson, 3 Wisc. 407; Christopher v. Covington, 2 B. Mon. 357, 359.

The question whether the defendant did the act in the execution of his authority, or otherwise, was held to be for the jury in Taylor v. Jones, 42 N. H. 25; Page v. De Puy, 40 Ill. 506.

(3) That, though the defendant acted under and within the terms of his authority in doing the original act complained of as a trespass, he subsequently so conducted himself that the law will not permit him to rely upon the authority given by the law as a justification. It is at this point alone that a replication is the proper form of pleading, since here alone are the allegations of the plea admitted and new facts set up, not to disprove the plea, but to show an affirmative reason for disallowing the justification shown by the plea. See Stoughton v. Mott, 25 Vt. 668; Andrews v. Chase, 5 Vt. 409; Jarratt v. Gwarthmey, 5 Blackf. 237.

It will be observed that the use of the term "trespass ab

initio" is avoided. The term seems to imply that subsequent conduct can make a person a trespasser in respect of acts which were not trespasses when they were committed. But in fact the doctrine intended applies only to justifications for admitted trespasses, and operates not to make that a trespass which was not such at the time it was committed, but to deprive the defendant of the benefit of a special authority given him by the law to do the acts complained of as the original trespass, as a justification for such acts.

The subsequent conduct of the defendant may consist either in

- (a) A failure to carry out the authority in the manner prescribed by the law; or,
 - (b) A substantial abuse of the power given by the law.
- (a) Failure to carry out the authority. Where the law gives the right to one person to enter upon or take the property of another, it only does so for a special purpose, and usually prescribes the manner in which that purpose shall be accomplished. The entry upon or taking of the property is only permitted as incidental to the more general purpose, and only justifiable when done in the execution of such more general purpose. Hence it follows that, if the defendant fails to pursue the general purpose in the manner prescribed by the law, he cannot justify the entry or taking.

Failure to return writ into court. — Upon this principle a writ of attachment or execution will be no defence to an officer for taking goods if he fail to return the writ into court in proper time. There is the further practical reason for this rule that, the officer's return being the best evidence of his acts, he should not, after his own failure to make a return, be allowed to show his acts by other evidence; Wright v. Marvin, 59 Vt. 437; Wiggin v. Atkins, 136 Mass. 292; Paine v. Farr, 118 Mass. 74; Williams v. Babbitt, 14 Gray 141; Oystead v. Shed, 12 Mass. 505; Williams v. Ives, 25 Conn. 568; Womack v. Bird, 63 Ala. 500. See also Barnard v. Graves, 13 Met. 85.

In New Hampshire it is held, however, that a mere mistake or omission in the return, and (semble) even an omission of the return, will not deprive an officer of his protection. Parker v. Pattee, 4 N. H. 530; Smith v. Moore, 17 Id. 380; Goodrich v. Foster, 20 Id. 177.

That a return may be excused by the express or implied

assent of the owner, see Williams v. Babbitt, supra; Paine v. Farr, supra; Womack v. Bird, supra.

In the case last cited it is held that an omission in the return, and *semble* even a failure to make any return, will not deprive the officer of his justification.

So also if an officer, after making an arrest upon civil process, fail to return the writ into court, he will not be protected; Munroe v. Merrill, 6 Gray 236.

In the same manner a failure to return the warrant in a criminal case will deprive the officer of his justification for arresting a person; Tubbs v. Tukey, 3 Cush. 438.

But such failure will be no defence to the party arrested for a criminal assault upon the officer; Commonwealth v. Tobin, 108 Mass. 426.

Failure to take out warrant, etc. — If an officer make an arrest of the person or a seizure of property under a statute authorizing such arrest or seizure, but requiring it to be followed by the taking of the offender before a magistrate, or the getting out of a warrant for the seizure, or the institution of other legal proceedings, the arrest or seizure will not be justified unless the officer comply with these requirements.

Arrest. — Brock v. Stimson, 108 Mass. 520; Phillips v. Fadden, 125 Mass. 198.

Seizure of liquors. — Kent v. Willey, 11 Gray 368; Tubbs v. Tukey, 3 Cush. 438.

Seizure of nets by fishwarden. — Russell v. Hanscomb, 15 Grav 166.

Failure to give proper notices. — Where the statute requires a special notice or account to be given to the owner of the property taken, the taking will not be justified unless such notice or account is given; Blanchard v. Dow, 32 Me. 557 (but see Spear v. Tilson, 24 Vt. 420); Sawyer v. Wilson, 61 Me. 529; Sutton v. Beach, 2 Vt. 42 (estray).

Actual knowledge by the owner does not avoid the necessity of such notice; Coffin v. Field, 7 Cush. 355; but see Norton v. Rockey, 46 Mich. 460.

So where cattle damage-feasant are distrained and impounded, a failure to leave with the poundkeeper a statement of the damages claimed and of the cause of the impounding as required by statute will deprive the distrainor of his justification; Bassit v. Glover, 1 Dane Ab. 137; Sherman v. Braman, 13 Met. 407;

Merrick v. Work, 10 Allen 544; Newhouse v. Hatch, 126 Mass. 364.

So also of a failure to have the damages properly assessed where this is required by statute; Hopkins v. Hopkins, 10 Johns. 369; Barrett v. Dolan, 71 Ia. 94.

In like manner, all the statutory formalities as to advertising and selling the property where a sale is authorized must be complied with or the original taking will not be justified; Buzzell v. Johnson, 54 Vt. 90; Kerr v. Sharp, 14 S. & R. 399; Smith v. Gates, 21 Pick. 55; Pierce v. Benjamin, 14 Id. 356; Wallis v. Truesdell, 6 Id. 455; Cressey v. Parks, 76 Me. 532; Knight v. Herrin, 48 Me. 533; Farnsworth Company v. Rand, 65 Me. 19; Blake v. Johnson, 1 N. H. 91.

But an immaterial error which can do no damage will not have that effect; Wheelock v. Archer, 26 Vt. 380.

Failure to appoint appraisers or to appoint such as are disinterested, as required by statute, will deprive officer of his protection; McGough v. Wellington, 6 Allen 505; Ross v. Philbrick, 39 Me. 29; Kerr v. Sharp, 14 S. & R. 399.

Failure to take a bond as required by statute will in some cases deprive an officer of his justification; Gay v. Burgess, 59 Ala. 575; Hall v. Monroe, 73 Me. 123; Comp. Churchill v. Churchill, 12 Vt. 661.

Failure by one who impounded cattle to give them proper food and water as required by statute has been held to deprive him of the protection of his legal right; Adams v. Adams, 13 Pick. 384.

A failure or omission in respect of some matter which is not prescribed by statute, especially if it does not relate immediately to the taking or disposal of the property, though it be in the same general proceeding, will not avoid the protection of the writ or other legal authority. The following are among the failures and omissions which have been held not to have that effect:—

- (a) Failure of plaintiff in suit in which attachment is made; Jackson v. Kimball, 121 Mass. 204; Lashus v. Matthews, 75 Me. 446.
- (b) Failure to take out execution within thirty days, or to sell property taken on execution; McGough v. Wellington, 4 Allen 502; Bell v. North, 4 Littell 133.
 - (e) Failure to dispose properly of the proceeds of the sale

after the property has been legally sold; Bentley v. White, 54 Vt. 564; Walker v. Lovell, 8 Foster (N. H.) 138; Abbot v. Kimball, 19 Vt. 551; Wilson v. Seavey, 38 Vt. 221. See also Heald v. Sargeant, 15 Vt. 506.

(b) Substantial abuse of authority.— One who enters upon or takes the property of another by virtue of a limited legal authority so to do may also lose the protection of such authority by a subsequent abuse of the same. This is upon the rather indefinite principle that the law will not suffer one who has abused its authority to protect himself under that authority from the natural consequences of his acts. It is impossible to define accurately the extent of the abuse which is necessary in order to deprive one of the protection of such an authority. It is clear that the abuse must be of a substantial nature and not merely trivial; Dwinnells v. Boynton, 3 Allen 310; Paul v. Slason, 22 Vt. 231; Fullam v. Stearns, 30 Vt. 443; Page v. De Puy, 40 Ill. 506.

In many cases it is held that the abuse must be in its nature a positive tort, and not merely a non-feasance; Averill v. Smith, 17 Wall. 82, 90; Richards v. McGrath, 100 Penn. St. 389; Ferrin v. Symonds, 11 N. H. 363; Griel v. Hunter, 40 Ala. 542; Stoughton v. Mott, 25 Vt. 668; Buzzell v. Johnson, 54 Vt. 90; Waterbury v. Lockwood, 4 Day 257; Gardner v. Campbell, 15 Johns. 401; Adams v. Rivers, 11 Barb. 390, 394; Tobin v. Deal, 60 Wisc. 87; Hinks v. Hinks, 46 Me. 423; Comp. Crawford v. Maxwell, 3 Humph. 476.

In Taylor v. Jones, 42 N. H. 25, it is said that the abuse must be such as to warrant the presumption that the legal authority was used simply as a cover for the commission of the subsequent abuse. But, while this is undoubtedly sufficient, it is not always necessary, as is shown by the cases already cited.

Among the acts of abuse which have been held sufficient to avoid the protection of a limited legal authority are the following:—

- (1) Using property taken under attachment; Lamb v. Day, 8 Vt. 407; Briggs v. Gleason, 29 Id. 78; Collins v. Perkins, 31 Id. 624.
- (2) Using or working an estray in a manner not required for its preservation; Weber v. Hartman, 7 Colo. 13; Barrett v. Lightfoot, 1 Monroe 241, 242; Gibbs v. Chase, 10 Mass. 125;

Nelson v. Merriam, 4 Pick. 249; Wilson v. McLaughlin, 107 Mass. 587.

- (3) Selling joint or partnership property taken on a writ against less than all of the joint owners or partners and not simply the interest of the defendant owner or owners; Melville v. Brown, 15 Mass. 81; Walker v. Fitts, 24 Pick. 191; Edgar v. Caldwell, Morris (Ia.)* 434; Smyth v. Tankersley, 20 Ala. 212; Ford v. Smith, 27 Wisc. 261; Moore v. Pennell, 52 Me. 162; Spalding v. Black, 22 Kans. 55.
- (4) Selling property taken under legal authority when there is no authority to sell, Owens v. Conner, 1 Bibb. 605 (distress where rent was reserved in kind); Parish v. Wilhelm, 63 N. C. 50 (sale on attachment after tender of amount due on writ).
- (5) Selling property taken under authority of law at a time or place different from that advertised; Hall v. Ray, 40 Vt. 576; Wilson v. Blake, 53 Id. 305; Buzzell v. Johnson, 54 Id. 90; Cressey v. Parks, 76 Me. 532.
- (6) Unlawfully breaking down doors, etc., after entry to execute legal process; Cate v. Schaum, 51 Md. 299; Snydacker v. Brosse, 51 Ill. 357; Walker v. Fox, 2 Dana 404.
- (7) Use of violence by one having a right to enter and take property peaceably; Daniels v. Brown, 34 N. H. 454.
- (8) Wantonly moving attached property in such a manner as to greatly injure it, or putting in an unfit person as keeper of such property, or failing to remove keeper or property attached from premises within a reasonable time; Snell v. Crowe, 3 Utah 26; Barrett v. White, 3 N. H. 210, 228; Malcom v. Spoor, 12 Met. 279; Cutter v. Howe, 122 Mass. 541; Davis v. Stone, 120 Id. 228; Williams v. Powell, 101 Id. 467; Boynton v. Warren, 99 Id. 172; Comp. Purrington v. Loring, 7 Id. 388.
- (9) Refusal by officer to permit debtor to take out exempt property from the property attached; Wilson v. Ellis, 28 Penn. St. 238; Freeman v. Smith, 30 Id. 264; Van Dresor v. King, 34 Id. 201; Stephens v. Lawson, 7 Blackf. 275.
- (10) Commission of waste; Palmer v. The State, Wright (Ohio) 364.
- (11) Levy upon property of a stranger to the writ after entry into house of defendant; Hazard v. Israel, 1 Binn. 240. See further Colby v. Jackson, 12 N. H. 526.

The following acts have been held insufficient to deprive one

acting under an authority given by the law of the protection of such authority: —

- (1) Officer failing to leave sufficient property as exempt from attachment or execution does not lose the protection of the writ except as to the property wrongfully taken; Wentworth v. Sawyer, 76 Me. 434. Comp. Stephens v. Lawson, 7 Blackf. 275, and other cases [supra (9)].
- (2) Sale of more property after enough has been sold to satisfy the execution does not avoid the protection of the writ as to the part rightfully sold; Seekins v. Goodale, 61 Me. 400; Butman v. Wright, 16 N. H. 219; Cone v. Forest, 126 Mass. 97. See also Walker v. Lovell, 8 Foster 138; Wheeler v. Raymond, 130 Mass. 247.
- (3) Charging illegal fees upon the writ; Holmes v. Hall, 4 Met. 419; Stevens v. Roberts, 121 Mass. 555.
- (4) Excessive attachment; Jarratt v. Gwathmey, 5 Blackf. 237.
- (5) Failure to put property attached into proper condition for preservation, Hale v. Huntley, 21 Vt. 147. See further, Gates v. Lounsbury, 20 Johns. 427; Van Brunt v. Schenck, 13 Johns. 414; Addison v. Hack, 2 Gill 221; Walsh v. Taylor, 39 Md. 592.

Pailures and wrongful acts by others than the defendant.— Neither any failure or omission, nor any act of abuse of authority by any one other than the defendant in the action of trespass, will have the effect of depriving such defendant of his justification under his authority unless such failure or omission, or such act of abuse, be committed by some one for whose acts and failures such defendant is absolutely responsible. Hence:—

- (1) A party who legally impounds cattle will not lose his protection by reason of the subsequent misconduct of the poundkeeper; Byron v. Crippen, 4 Gray 312; Coffin v. Vincent, 12 Cush. 98.
- (2) The poundkeeper will not lose his protection by reason of the previous wrongful acts of the party impounding, of which he has no knowledge; Folger v. Hinckley, 5 Cush. 263; Anthony v. Anthony, 6 Allen 408.
- (3) A failure of a magistrate to whom application is made for a warrant after a seizure of liquors, to issue notices as required by law, will not deprive the officer who made the

seizure of his protection for making the seizure; Voetsch v. Phelps, 112 Mass. 407; Grafton v. Carmichael, 48 Wisc. 660.

- (4) A plaintiff in a writ is not liable for an abuse of process by the officer who serves it unless he advise or direct the abuse, or afterwards adopts and takes the benefit of the same; Snydacker v. Brosse, 51 Ill. 357; Becker v. Dupree, 75 Ill. 167; Ferriman v. Fields, 3 Brad. App. 252; Hyde v. Cooper, 26 Vt. 552; Justice v. Mendell, 14 B. Mon. 12; Michels v. Stork, 44 Mich. 2; Ward v. Carp River Iron Co., 50 Id. 522; Grafton v. Carmichael, 48 Wisc. 660.
- (5) A subsequent abuse of process by an officer will not avoid the protection of the writ as to one who assisted only in making a legal levy; Oystead v. Shed, 12 Mass. 511; Wheelook v. Archer, 26 Vt. 380.
- (6) An innocent purchaser at an execution sale will not be held a trespasser by relation though the goods were the goods of a stranger to the writ; Glass v. Black, 91 Penn. St. 418; Justice v. Mendell, 14 B. Mon. 12.
- (7) But an abuse by the deputy or bailee of an officer is the same as if done by the officer himself, since the officer is responsible for the conduct of his deputy or bailee; Everett v. Herrin, 48 Me. 537; Briggs v. Gleason, 29 Vt. 78.

Acts wrongful as against others than the plaintiff. — If it appears that the plaintiff in the action of trespass has not suffered from the omission or abuse of the defendant, the latter will not be deprived of the protection of his authority as against such plaintiff, even though the act or omission is in itself sufficient to avoid such protection, and would have that effect as against some other person who was injured by the wrongful act or omission.

Thus a mortgagee of property rightfully sold upon execution cannot complain that the officer afterwards sold other property, not needed to satisfy the execution, even if this would in itself be enough to avoid the officer's protection. (Semble it would not.) Wolcott v. Root, 2 Allen 194.

So too it has been held that a sale without an order of court upon a writ against one who has fraudulently transferred his property will not deprive the officer of the protection of the writ as against the fraudulent grantee of the property. But see dissenting opinion of Stone, J., Hartshorn v. Williams, 31 Ala. 149.

Failure to give notice to a second attaching creditor will not deprive officer of his justification as against the owner of the property; Wheeler v. Raymond, 130 Mass. 247.

The fact that an execution has been paid, or that a legal process has been rendered inoperative by a supersedeas, will not deprive an officer who acts under such writ or process in ignorance of such facts of the protection of the writ or process. But it is otherwise with the plaintiff in the action, as he is bound to know the facts; Breck v. Blanchard, 20 N. H. 323; Morrison v. Wright, 7 Porter 67; Richards v. McGrath, 100 Penn. St. 389.

A subsequent vacating of proceedings upon attachment or execution will not deprive an officer of his protection for acts done under such writs unless the proceedings were absolutely void or are set aside as irregular; Day v. Bach, 87 N. Y. 56; Field v. Anderson, 103 Ill. 403.

If an officer have both a valid and an invalid writ, he will be presumed to act under the valid writ, in so far as his acts can be justified by it. This has been held to be so even though the property was afterwards applied upon the invalid process; Wilson v. Seavey, 38 Vt. 221; Parish v. Wilhelm, 63 N. C. 50.

The question in all cases being simply whether the defendant in trespass has by his conduct lost the benefit of the protection given him by the fact that he was acting under an authority given him by the law in doing the original act complained of as a trespass, it is evident that this doctrine can have no application to a case where the original act did not in itself amount to a trespass. The question assumes the doing of an act sufficient to constitute a technical trespass. It does not make that a trespass which was not such at the time it was committed; Davis v. Young, 20 Ala. 151; Johnson v. Hannahan, 1 Strobh. 313; Henderson v. Marx, 57 Ala. 169.

It is evident, for the same reason, that the doctrine cannot operate to make that a crime which was not a crime at the time it was committed: The State v. Moore, 12 N. H. 42; Commonwealth v. Tobin, 108 Mass. 426.

It has been held that the acts or omissions relied on to deprive the defendant of his justification must have occurred before action brought; Norton v. Rockey, 46 Mich. 460; Waterbury v. Lockwood, 4 Day 257. But the reason for this is not apparent. The question is not as to the existence of a cause of

action at the time the action is begun, but as to whether the defendant has by his wrongful conduct forfeited his protection for doing acts in themselves wrongful but protected by a limited legal authority to do them, and it does not seem clear why such wrongful conduct, even after action is brought, should not forfeit such protection.

LAMPLEIGH v. BRATHWAIT.

MICH. 12 JACOBI. - ROT. 712.

[REPORTED HOBART, 105.]

A mere voluntary courtesy will not uphold an assumpsit; but a courtesy moved by a previous request will. — Labor, though unsuccessful, is a good consideration. — Of assumpsit and considerations generally.

ANTHONY LAMPLEIGH brought an assumpsit against Thomas Brathwait and declared, that, whereas the defendant had feloniously slain one Patrick Mahune; the defendant, after the said felony done, instantly required the plaintiff to labor, and do his endeavor to obtain his pardon from the king, (a) whereupon the plaintiff, upon the same request, did, by all the means he could and many days' labor, do his endeavor to obtain the king's pardon for the said felony, viz. in riding and journeying at his own charges from London to Roiston, when the king was there, and to London back, and so to and from Newmarket, to obtain pardon for the defendant for the said felony. Afterwards, scil., &c., in consideration of the premises, the said defendant did promise the said plaintiff to give him 100l., and that he has not, &c., to his damage 1201.

To this the defendant pleaded non assumpsit, and found for the plaintiff, damage 100l. It was said in arrest of judgment, that the consideration was passed.

But the chief objection was, that it doth not appear that he did anything towards the obtaining of the pardon, but riding

cited in the judgment of Pollock, C.B.,

⁽a) In Norman v. Cole, 3 Esp. 253, in Egerton v. Brownlow, 4 H. of Lords' this consideration was held illegal Cases, 148, see per Willes, J., Elliot v. Richardson, 39 L. J. C. P. 343].

up and down, and nothing done when he came there. And of this opinion was my brother (Warburton), but myself and the other two judges were of opinion for the plaintiff, (a) and so he had judgment.

First, it was agreed, that a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference. Pasch. 10 Eliz., Dyer, 272. Hunt and Bates. See Oneley's Case, 19 Eliz., Dyer, 355.

Then, as to the main point, it is first clear, that in this case upon the issue non assumpsit, all these points were to be proved by the plaintiff: -

- 1. That the defendant had committed the felony, prout, &c.
- 2. Then that he requested the plaintiff's endeavor, prout, &c.
- 3. That thereupon the plaintiff made his proof, prout, &c.
- 4. That thereupon the defendant made his promise, prout, &c. For wheresoever I build my promise upon a thing done at

my request, the execution of the act must pursue the request,

for it is like a case of commission for this purpose.

So then the issue found ut supra is a proof that he did his endeavor according to the request, for else the issue could not have been found; for that is the difference between a promise upon a consideration executed and executory, that in the executed you cannot traverse the consideration by itself, because it is passed and incorporated and coupled with the promise. (b) And if it were not indeed then acted, it is nudum pactum.

But if it be executory, as, in consideration that you shall serve me a year, I will give you ten pound, here you cannot bring your action, till the service performed. But if it were a promise on either side executory, it needs not to aver performance, for it is the counter-promise, and not the performance, that makes the consideration; (c) yet it is a promise before,

⁽a) See 1 Wms. Saund. 211 c. in notis, 2 Wms. Saund. 136, in notis.

⁽b) See R. H. 1834 [Reg. Gen. H. T. 1853, r. 6], Passenger v. Brookes, 1 Bing. N. C. 587 [7 C. & P. 110; 1 Scott, 560, explained in Bennion v. Davison, 3 M. & W. 179].

⁽c) See notes to Pordage v. Cole, 1 Wms. Saund. 548, and to Peeters v. Opie, 2 Wms. Saund. 742 [and to Cutter v. Powell, post, vol. 2].

though not binding, and in the action you shall lay the promise as it was, and make special averment of the service done after.

Now, if the service were not done, and yet the promise made, prout, &c., the defendant must not traverse the promise, but he must traverse the performance of the service, because they are distinct in fact, though they must concur to the bearing of the action.

Then also note here, that it was neither required nor promised to obtain the pardon, but to do his endeavor to obtain it: the one was his end and the other his office.

Now, then, he hath laid expressly, in general, that he did his endeavor to obtain it: viz., in equitando, &c., to obtain. Now, then, clearly, the substance of this plea is general, for that answers directly the request, the special assigned is but to inform the court; and therefore, clearly, if, upon the trial, he could have proved no riding nor journeying, yet any other effectual endeavor according to the request would have served: and therefore, if the consideration had been, that he should endeavor in the future, so that he must have laid his endeavor expressly, and had done it as he doth here, and the defendant had not denied the promise, but the endeavor, he must have traversed the endeavor in the general, not in the riding, &c., in the special; which proves clearly, that is not the substance, and that the other endeavor would serve. This makes it clear, that, though particulars ought to be set forth to the court, and those sufficient, which were not done, which might be cause of demurrer; yet being but matter of form, and the substance in the general, which is herein the issue and verdict, it were cured by the verdict; but the special is also well enough; for all is laid down for the obtaining of the pardon which is within the request; and therefore, suppose he had ridden to that purpose, and Brathwait had died, or himself, before he could do anything else, or that another had obtained the pardon before, or the like, vet the promise had holden.

And observe that case, 22 E. 4. 40. Condition of an obligation, to show a sufficient discharge of an annuity, you must plead the certainty of the discharge to the court. (a) The

order that the court [might] judge of its sufficiency. See 1 Wms. Saunders, 327, $n.\ d.$

⁽a) So to a plea of *nul agard* in an action on a bond to perform an award, the replication must [before the 15 & 16 Vict. c. 76 have] set out the award in

reason whereof, given by Brian and Choke, is, that the plea there contains two parts, one a trial per pais, scil. the writing of the discharge, the other by the court, scil. the sufficiency and validity of it, which the jury could not try, for they agree, that if the condition had been to build a house agreeable to the state of the obligee, because it was a case all proper for the country to try, it might have been pleaded generally: and then it was a demurrer, not an issue, as is here.

Whenever the consideration of a promise is executory there must ex necessitate rei have been a request on the part of the person promising. For if A. promise to remunerate B., in consideration that B. will perform something specified, that amounts to a request to B. to perform the act for which he is to be remunerated. See King v. Sears, 2 C. M. & R. 53; 5 Tyrwh. 587 [and Shadwell v. Shadwell, 9 C. B. N. S. 159; 30 L. J. C. P. 145. In that case, the following letter had been written to plaintiff by his uncle, defendant's testator:

—"I am glad to hear of your intended marriage with E. N.; and as I promised to help you at starting, I am happy to tell you that I will pay to you 150l. yearly during my life, and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas." Plaintiff married E. N., and in an action against his uncle's executors for arrears of the annuity, it was held by the majority of the Court of Common Pleas that the above letter amounted to a request to plaintiff to marry E. N., and that the promise was therefore binding].

The only difficulty that can arise in such cases is on the question which sometimes occurs whether the consideration move from the plaintiff: as, for instance, if A., in consideration of something to be done by B., were to promise something to C., in this case C., being a stranger to the consideration, unless he in some way had intervened in the agreement between A. and B., could not sustain an action on the promise. See Price v. Easton, 4 B. & Ad. 433; Osborne v. Rogers, 1 Wms. Saund. 264; Thomas v. Shillibeer, 1 M. & W. 125 [Tweddle v. Atkinson, 1 B. & S. 393]. But if the plaintiff have intervened in the agreement, that is sufficient. Tipper v. Bicknell, 3 Bing. N. C. 710; Webb v. Rhodes, ib. 734. [In M'Coubray v. Thomson, 2 Ir. R. C. L. 226, the plaint recited that A. was possessed of a farm, value 1961., and was desirous of dividing it between B. and C., and that it was agreed between the parties that in consideration that A. would hand over to B. the possession of the said farm, B. should pay C. 981. It was held that C.'s intervention in the agreement was not sufficient to enable him to maintain an action upon it against B. Sed quære.

The common-law rule above stated does not apply where it appears that the person with whom the contract is made is meant to be trustee for a third person for whom the benefit is intended. In such case, the third person would be entitled in equity to enforce the contract, see *Gandy v. Gandy*, 30 Ch. D. 57; 54 L. J. Ch. 1154, where the cases are collected; and see *In re Rotherham*, &c., Co., 25 Ch. D. 103; 53 L. J. Ch. 290.]

In Lilly v. Hayes, 5 A. & E. 549, A. transmitted money to B. and afterwards informed him that it was for C.: B. having assented to this, and C. having, by B.'s authority, been informed of it, it was held that B. had in effect made him-

self C.'s banker as to the 100l., and that C. might maintain assumpsit for money had and received against B. See also Dutchman v. Tooth, 5 Bing. N. C. 577 [and Noble v. The National Discount Company, 5 H. & N. 225; 29 L. J. Exch. 210; Griffin v. Weatherby, L. R. 3 Q. B. 753]. The case of Lilly v. Hayes should carefully be compared with and distinguished from that class of cases, constituting a long series from Williams v. Ererett, 14 East, 582, to Orr v. Union Bank of Scotland, 1 MacQueen, 513, in which it has been held that the mere payment of money by A. to B. for C. is revocable, and confers no right of action upon C. [see Moore v. Bushell, 27 L. J. Exch. 3; and for the application of the same doctrine in equity, Hill v. Royds, L. R. 8 Eq. 290; see also Field v. Megan, L. R. 4 C. P. 660]. Perhaps the distinction is between a case in which the receiver of the money has undertaken to hold it as the agent of the person for whom it is destined, and where no such undertaking has been given. [And for the distinction between those cases in which the defendant has (as in Lilly v. Hayes) constituted himself agent to the plaintiff to pay to him a particular sum of money received from a third person, and those cases in which A. being indebted to B., and B. to C., it has been mutually arranged that A. shall pay C., see Liversidge v. Broadbent, 4 H. & N. 603; 28 L. J. Exch. 332. To make such an arrangement binding at Common Law, so as to give C. a right of action against A., there must have been an ascertained debt due in præsenti from A. to B., and this, as well as the original debt from B. to C., must have been extinguished in order to create a consideration for A.'s promise to pay C. 1 Wms. Saund. 210 a, note; Fairlie v. Denton, 8 B. & C. 395; Tatlock v. Harris (per Buller, J.), 3 T. R. 180; Wilson v. Coupland, 5 B. & A. 228; Cochrane v. Green, 9 C. B. N. S. 448; 30 L. J. C. P. 97; infra, notes to Cumber v. Wane.

But now by 36 & 37 Vict. c. 66 (The Supreme Court of Judicature Act), s. 25, subs. 6, Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.]

Where the consideration is executed, unless there have been an antecedent request, no action is maintainable upon the promise; for a request must [have been laid in the declaration, and proved, if put in issue at the trial. Child v. Morley, 8 T. R. 610; see Sutton v. Tatham, 10 A. & E. 27; Stokes v. Lewis, 1 T. R. 20; Naish v. Tatlock, 2 H. Bl. 319; Hayes v. Warren, 2 Str. 933; Richardson v. Hall, 1 B. & B. 50; Durnford v. Messiter, 5 M. & S. 446. For although courts of law will not, in the absence of fraud, enter into the question of adequacy of consideration [Haigh v. Brooks, 10 A. & E. 309; Kearns v. Durell, 6 C. B. 596; Hart v. Miles, 4 C. B. N. S. 371]; Skeate v. Beale, 11 A. & E. 983; England v. Davison, 11 A. & E. 856, yet a mere voluntary courtesy is not sufficient to support a subsequent promise; but when there was previous request, the courtesy was not merely voluntary, nor is the promise nudum pactum, but couples itself with, and relates back to, the previous request, and the merits of the party which were procured by that request, and is therefore on a good consideration. See Pawle v. Gunn, 4 Bing. N. C. 448; Bradford v. Roulston, 8 Irish Com. Law R. 468.] When, however, it is above said the request

must be laid and proved, it must be understood that there are some cases in which the consideration, though executed, is of such a nature that it must have been moved by a previous request, and in which, therefore, as in a case of executory consideration, the statement that what was done was at the defendant's request is merely expressio eorum quæ tacite insunt, and, therefore, unnecessary. Such, for instance, is the case of money lent, which, if lent at all, must obviously have been so with the borrower's concurrence. But the demand for money paid to the defendant's use stands on a different footing, for it may be so paid without his request, which, consequently, ought to be averred in terms, and proved, either directly or by circumstances from which it may be implied by law. Victor v. Davies, 12 M. & W. 758; 1 M. & Gr. 265, note. Such a request may be either express or implied. If it have not been made in express terms, it will be implied under the following circumstances:—

First. — Where the consideration consists in the plaintiff's having been compelled to do that to which the defendant was legally compellable. Jeffreys v. Gurr, 2 B. & Ad. 833; Pownall v. Ferrand, 6 B. & C. 439; Exall v. Partridge, 8 T. R. 308; Grissel v. Robinson, 3 Bing. N. C. 13 [Connell v. McGorlich, 12 Irish C. L. 153; and Bradshaw v. Beard, 12 C. B. N. S. 344. As to what amounts to compulsion, see Johnson v. Royal Mail Steam Packet Co., L. R. 3 C. P. 38, 37 L. J. C. P. 33. This proposition has been held to be limited to cases where at the time of the compulsion there was some privity between the plaintiff and the defendant. Griffinhoofe v. Daubuz, 5 E. & B. 746; 25 L. J. Q. B. 237. And where the plaintiff had for his own purposes, and without any request express or implied on the part of the defendant, left his goods on the premises of the latter, and upon distress put in by the defendant's landlord, had paid the rent and ransomed his goods, it was held, distinguishing Exall v. Partridge, that he could not recover the amount from the defendant. England v. Marsden, L. R. 1 C. P. 529; 35 L. J. C. P. 259. This case was, however, questioned in the C. A. in Edmunds v. Wallingford, 14 Q. B. D. 811; 54 L. J. Q. B. 305, where also Griffinhoofe v. Daubuz was explained upon the facts. See infra. p. 177.]

Secondly. — Where the defendant has adopted and enjoyed the benefit of the consideration, for in that case the maxim applies omnis ratihibitio retrotrahitur et mandato æquiparatur. Vide Pawle v. Gunn, 4 Bing. N. C. 448 [Barber v. Brown, 1 C. B. N. S. 121].

Thirdly. — Where the plaintiff roluntarily does that whereunto the defendant was legally compellable, and the defendant afterwards, in consideration thereof, expressly promises. Wennall v. Adney, 3 B. & P. 250, in notis; Wing v. Mill, 1 B. & A. 104; Selw. N. P. 8th ed. p. 57, n. 11; Paynter v. Williams, 1 C. & M. 818. But it must be observed that there is this distinction between this and the two former cases, viz. that in each of the two former cases the law will imply the promise as well as the request, whereas in this and the following case the promise is not implied, and the request is only then implied when there has been an express promise. Atkins v. Banwell, 2 East, 505.

Fourthly. — In certain cases, where the plaintiff voluntarily does that to which the defendant is morally, though not legally, compellable, and the defendant afterwards, in consideration thereof, expressly promises. See Lee v. Muggeridge, 5 Taunt. 36; Watson v. Turner, B. N. P. 129, 147, 281; Trueman v. Fenton, Cowp. 544; Atkins v. Banwell, 2 East, 505.

But every moral obligation is not perhaps sufficient for this purpose. See per Lord Tenterden, C. J., in *Littlefield v. Shee*, 2 B. & Ad. 811. Indeed it seems to be now clearly settled by the elaborate judgment of the Court of Queen's Bench in *Eastwood v. Kenyon*, 11 A. & E. 452, 3 P. & D. 276, S. C., that a

mere moral obligation, however sacred, is not a sufficient foundation for a binding promise, and that the class of considerations derived from moral obligation includes only those cases in which there has been a legal right which is become devoid of legal remedy. Such, for instance, is the case of a promise made by a debtor whose liability has been barred by the Statute of Limitations. See note to Whitcombe v. Whiting, post [and Latouche v. Latouche, 3 H. & C. 576]. And see what is said as to infancy, Williams v. Moor, 11 M. & W. 263 [though now since the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2, no action can be brought on any promise made after full age to pay a debt contracted during infancy].

Another instance, before the statute 12 & 13 Vict. c. 106 (the Bankrupt Law Consolidation Act, 1849), was the case of a bankrupt discharged from debts by his certificate, but whose moral obligation, though devoid of legal sanction, was considered capable of sustaining a new express promise to pay a debt so discharged, and such a promise might have been made either before or after certificate: see Trueman v. Fenton, Cowp. 544; Kirkpatrick v. Tattersall, 13 M. & W. 766. The 204th section of the above statute had the effect of annulling the legal efficacy of such promises even though under seal of the bankrupt, and had left them upon the footing of honorary obligations only. [This section was reenacted in substance by the 164th section of the Bankruptcy Act, 1861. Both Acts were repealed by the Bankruptcy Repeal and Insolvent Court Act of 1869, and no similar provision was reënacted in the Bankruptcy Act, 1869. It was, nevertheless, held that such a promise is bad, Heather v. Webb, 2 C. P. D. 1; 46 L. J. C. P. 89, unless there be new consideration, Jakeman v. Cook, 4 Ex. D. 26, 48 L. J. Ex. 165; and such a promise, although made for fresh consideration by a compounding debtor before the completion of the composition, is bad. Ex parte Barrow, 18 Ch. D. 464; 50 L. J. Ch. 821. The Bankruptcy Act, 1883, like that of 1869, contains no section in terms avoiding such promises. As another instance of a debt barred by statute being held a good consideration may be added Flight v. Reed, 1 H. & C. 703; 32 L. J. Ex. 265, where bills of exchange given after the repeal of the usury laws in renewal of bills accepted as a security for a loan while those laws were in force, and void under them, were held enforceable; sed quære.]

The tendency of modern decisions has been to confine the legal efficacy of moral obligation to the cases above mentioned. Thus, where a man seduced a woman, and, after cohabitation had ceased, by way of compensation, expressly promised to pay a yearly sum for her support, that promise was held not to be binding in law: Beaumont v. Reeve, 8 Q. B. 483. [See also Hulse v. Hulse, 17 C. B. 711, where it was held that a payee could not maintain an action on a promissory note given as a gratuity for past services and in the expectation of future services, there being no contract binding him to serve, and therefore no consideration for the note. Compare Maddison v. Alderson, L. R. 8 App. Cas. 467; 52 L. J. Q. B. 737.]

Whether a father impliedly undertakes to repay any person supporting his child whom he deserts? Dubitatur, Urmston v. Newcomen, 4 A. & E. 899. It seems that no such undertaking would be implied by law. Parke, B., in Seaborne v. Maddy, 9 Car. & P. 497, said, "No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so. Every man is to maintain his own children as he himself shall think proper; and it requires a contract to enable another person to do so, and charge him for it in an action." The same rule was laid down in Mortimore v. Wright, 6 M. & W. 482, where, per Lord Abinger, "in point of law, a father who gives no authority and enters into no contract is no more lia-

ble for goods supplied to his son than a brother or an uncle, or a mere stranger would be;" and Parke, B., said, "It is a clear principle of law, that a father is not under any legal obligation to pay his son's debts, except, indeed, by proceedings under the 43 Eliz., by which he may, under certain circumstances, be compelled to support his children according to his ability; but the mere moral obligation to do so cannot impose any legal liability." [But in Bazeley v. Forder, L. R. 3 Q. B. 559, 37 L. J. Q. B. 237, where a wife living separate from her husband, through no fault of her own, had against her husband's will obtained the custody of her child by an application under 2 & 3 Vict. c. 54, s. 1, in an action brought by a tradesman against the husband for clothes supplied to the child by order of the wife, it was held, Cockburn, C. J., dissenting, that the plaintiff could recover. The ground of the decision, however, was that the child being by act of law in the custody of the wife, necessaries for it became on the same footing as necessaries for the wife herself. The mother of an illegitimate child is bound by statute (4 & 5 Will. IV. c. 76, s. 71) to maintain it while she is unmarried or a widow; but after her death, without having made a will in its favor, there is no legal liability to support it out of her estate, Ruttinger v. Temple, 4 B. & S. 491; 33 L. J. Q. B. 1.]

The future maintenance of a child would, however, of course be a sufficient consideration for a promise, Jennings v. Brown, 9 M. & W. 496 [and Smith v. Roche, 6 C. B. N. S. 223, 28 L. J. C. P. 237, where the father of bastard children was held liable on a promise to their mother to pay her an annuity, in consideration of her undertaking to take charge of them and to supply them with necessaries, and see Knowlman v. Bluett, L. R. 9 Ex. 1 & 307, 43 L. J. Ex. 151]. And such a promise need not be in express terms, but may be implied from circumstances, Blackburn v. Mackey, 1 C. & P. 1; Law v. Wilkin, 6 A. & E. 718; 1 N. & P. 697; though, according to the case of Mortimore v. Wright, supra, "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person, and it would bring the law into great uncertainty if it were permitted to juries to impose a liability in each particular case according to their own feelings or prejudices," per Lord Abinger.

A remarkable exception from the rule, that a promise to pay may be implied from a previous request, occurs in the case of a barrister, who can claim no remuneration for services performed at the request of the client, the circumstance of his profession rebutting the implication of a promise, which would otherwise have arisen. ["The relation of counsel and client in litigation, creates the incapacity to make a contract of hiring as an advocate. It follows that the requests and promises of the defendant, and the services of the plaintiff," a barrister suing for compensation for professional services to the defendant, "created neither an obligation, nor an inception of an obligation, nor any inchoate right whatever, capable of being completed and made into a contract by any subsequent promise." These are the words of Chief Justice Erle, delivering a memorable judgment in Kennedy v. Broun, 13 C. B. N. S. 677; 32 L. J. C. P. 137. See also Mostyn v. Mostyn, L. R. 5 Ch. 457; 39 L. J. Ch. 780. Another exception from the same rule is to be found in the case of physicians; according to usage, their fee is an honorarium; still, being under no incapacity such as that of the barrister, they might make valid express contracts, rendering their clients legally liable to pay them for their services. See Veitch v. Russell, 3 Q. B. 928; the judgment of Wood, V.-C., in the A.-G. v. The Royal College of Physicians, 1 Johns. & Hem. 561; and Kennedy v. Broun, ubi supra. Now, by the Medical Act (21 & 22 Vict. c. 90, s. 31) physicians, if duly registered (Turner v. Reynall, 14 C. B. N. S. 328), are entitled to recover reasonable remuneration for their services, unless a bylaw to the contrary be made by the college to which they belong. See Gibbon v. Budd, 2 H. & C. 92; 32 L. J. Exch. 182, where the usual fees were recovered. In a note to the report of that case, it appears that the Royal College of Physicians has passed a bylaw disentitling its fellows to sue for professional aid rendered.]

Another exception may be where there is a covenant under seal, which would rebut the inference of an implied promise, and not sustain an express one (to do what is covenanted) for want of new consideration, *Baber* v. *Harris*, 9 A. & E. 532; *Middleditch* v. *Ellis*, 2 Exch. 623 [*Matthew* v. *Blackmore*, 1 H. & N. 762].

Upon the question, what will amount to evidence of a request where it is necessary to prove one, see Alexander v. Vane, 1 M. & W. 511, where A. and B. went to C.'s shop; A. ordered goods, and B. said in A.'s presence that he would pay for them if A. did not. This was held evidence of a request from A. to B. to pay for them in case of his own default. [A principal is bound to indemnify his agent against the natural consequences of all acts done by him in pursuance of the authority conferred upon him; and if in obedience to any custom or usage of the business, or any rule of the market in which his principal has deputed him to act, or otherwise in the regular course of his employment, he pays money on behalf of his principal, a request to make the payment will be implied, Sutton v. Tatham, 10 A. & E. 27; Taylor v. Stray, 2 C. B. N. S. 175; Smith v. Lindo, 5 C. B. N. S. 587; Rosewarne v. Billing, 15 C. B. N. S. 316; 33 L. J. C. P. 55; Duncan v. Hill, L. R. 6 Ex. 255; 40 L. J. Ex. 137; Bowring v. Shepherd, L. R. 6 Q. B. 309; 40 L. J. Q. B. 129; but see Duncan v. Hill, L. R. 8 Exch. 242; 42 L. J. Exch. 179.]

One of the most singular, perhaps the most singular case determined on the ground of nudum pactum, is Hopkins v. Logan, 5 M. & W. 247, where it was held that an account stated, and a sum thereupon found to be due to the plaintiff, will not support a promise to pay such sum in futuro, though the law would imply a promise to pay it in præsenti. The ground of the dec'sion appears to have been, that the promise implied by law to pay in presenti exhausted as it were the consideration, and that there was, consequently, no consideration left for any other promise; so that it bears some analogy to Granger v. Collins, 6 M. & W. 458; in which a declaration that B. had agreed to take A.'s house at a certain rent; and that A., in consideration of the premises, promised that he should enjoy without eviction from C., was held bad for want of a consideration to support the assumpsit; and see Brown v. Crump, 1 Marsh 567; Jackson v. Cobbin, 8 M. & W. 790; Roscorla v. Thomas, 3 Q. B. 234; 2 Gale & D. 508; Kaye v. Dutton, 8 Scott, N. R. 495; and [Elderton v. Emmens, 4 H. of Lords Cases, 624. In McManus v. Bark, L. R. 5 Exch. 65; 39 L. J. Ex. 55; an attempt was made to set up in answer to an action a promise analogous to that sued upon in Hopkins v. Logan. In that case the defendant had made a promissory note for £520. In an action by payee's executor on the note, a subsequent agreement between defendant and the payee that the sum secured by the note should be paid by instalments with interest, was held to be no answer to the action, inasmuch as there was no consideration for the agreement, which was therefore binding on neither party.] In Hopkins v. Logan, as has been just observed, a debt payable in prasenti was held no consideration for a promise to pay in futuro; but in Walker v. Rostron, 9 M. & W. 411, the Court of Exchequer held that a debt payable in futuro was a good consideration for a promise by the debtor's agent to appropriate funds in his hands by way of security for the debt. The distinction seems to be between an executed transfer and an executory

promise. In Kaye v. Dutton, 2 D. & L. 296-7; 8 Scott, N. R. 502-3, Tindal, C. J., after citing Hopkins v. Logan, and other cases of that class, points out the possibility of a distinction between them and cases of executed consideration from which no promise can be implied by law, intimating that possibly, although considerations of the former class are only capable of supporting the promise implied by law, yet those of the latter may be capable of supporting any promise otherwise unobjectionable. No decision, however, was pronounced upon that point. And it seems impossible to state any rational distinction between the latter class of cases and moral obligations of pure gratitude for favors past, which, as we have seen (ante, pp. 161-2), will not sustain a promise. The question was again much discussed, but not decided, in Elderton v. Emmens, supra [Lattimore v. Garrard, 1 Exch. 809].

It is perhaps upon the principle that a gift while executory is nudum pactum, and therefore incapable of being enforced, that a parol gift of chattels is held to pass no property to the donee without delivery, Irons v. Smallpiece, 2 B. & A. 551. Even where the intended donee is in possession at the time of the gift, Shower v. Pilck, 4 Exch. 478. [However, "It is going too far to say that retention of possession by the donor is conclusive proof that there is no immediate present gift." Per Cave, J., Ex parte Ridgway, 15 Q. B. D. 447; 54 L. J. Q. B. 570.] The property may be passed by a contract of sale for valuable consideration without delivery, Dixon v. Yates, 5 B. & Ad. 340, per Parke, J.; but whether it does pass or not must depend upon the intention of the parties, and it was held, in a modern case in the Court of Exchequer [which seems not to have been reported], that the property in a specified chattel, bought in a shop, to be paid for upon being sent home, did not pass before delivery.

It has been above stated that one of the cases in which an express request is unnecessary, and in which a promise will be implied, is that in which the plaintiff has been compelled to do that to which the defendant was legally compellable. On this principle depends the right of a surety who has been damnified to recover an indemnity from his principal. Toussaint v. Martinnant, 2 T. R. 100; Fisher v. Fellows, 5 Esp. 171 [Emery v. Clark, 2 C. B. N. S. 582]. Thus, the indorser of a bill who has been sued by the holder, and has paid part of the amount, being a surety for the acceptor, may recover it back as money paid to his use and at his request, Pownall v. Ferrand, 6 B. & C. 439. So may the acceptor, where under the circumstances, e. g. by reason of a composition or the like, the bill ought not to have been negotiated, or ought to have been taken up by some other person, Hawley v. Beverley, 6 M. & G. 221; 6 Scott, N. R. 837; Horton v. Riley, 11 M. & W. 492; Hooper v. Treffry, 1 Exch. 17. But then the surety must have been compelled, i. e., he must have been under a reasonable obligation and necessity to pay what he seeks to recover from his principal; for if he improperly defend an action and incur costs, there will be no implied duty on the part of his principal to reimburse him those, unless the action was defended at the principal's request, Roach v. Thompson, 1 M. & M. 487. See 4 C. & P. 194, 11 A. & E. 31, n.; Gillett v. Rippon, 1 M. & M. 406; Knight v. Hughes, 1 M. & M. 247; Smith v. Compton, 3 B. & Ad. 407; Short v. Kalloway, 11 A. & E. 28, ubi per Lord Denman, "No person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action he cannot defend." See Walker v. Hatton, 10 M. & W. 249; Tindall v. Bell, 11 M. & W. 228 [and Bonneberg v. Falkland Islands Co., 34 L. J. C. P. 34]. But if he make a reasonable and prudent compromise, he will be justified in doing so, Smith v. Compton [ubi supra; Dixon v. Fawcus, 30 L. J. Q. B. 137]. And where the plaintiff's claim is of an unliquidated nature and needs investigation, it seems that he may, unless expressly forbidden, incur the

expense of investigating it, or at least that very slight evidence is enough to raise an inference that the person ultimately liable has assented to his doing so, Blyth v. Smith, 5 M. & Gr. 405; 6 Scott, N. R. 360.

It seems to be for the jury in each case to say whether, in defending and incurring the costs sought to be recovered, the plaintiff pursued the course which a prudent and reasonable man, unindemnified, would do in his own case, and if the jury find that he did, the costs may be recovered, Tindall v. Bell, supra Broom v. Hall, 7 C. B. N. S. 503; The Legatees, 1 Swab. Adm. R. 168; Mors Le Blanch v. Wilson, L. R. 8 C. P. 227, 42 L. J. C. P. 70, overruled by Baxendale v. L. C. & D. Rail. Co., L. R. 10 Ex. 35; 44 L. J. Ex. 20; Fisher v. Val de Travers Co., 1 C. P. D. 511; 45 L. J. C. P. 135]. However, it is always advisable for the surety to let his principal know when he is threatened, and request directions from him; for the rule laid down by the King's Bench in Smith v. Compton, 3 B. & Ad. 407, is, that "the effect of want of notice (to the principal) is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms if an opportunity had been given him. . . . The effect of notice to an indemnifying party is stated by Buller, J., in Duffield v. Scott, 3 T. R. 376, recognized in Jones v. Williams, 7 M. & W. 493. 'The purpose of giving notice is not in order to give a ground of action; but if a demand be made, which the party indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money." [And see O. XVI., pt. vi., of the Rules of the Supreme Court, 1883, as to third party proceeding under the Judicature Act. Judgment against the principal debtor is not conclusive against the surety, Ex parte Young, 17 Ch. D. 668; 50 L. J. Ch. 824.]

It is very necessary in this place to observe the distinction between the case of a contract to indemnify, or a contract to do the very thing to which the contractee is liable, and the breach of which, consequently, may raise an obligation to indemnify the contractee against such liability, and a contract to do something not precisely the same with that to which the contractee is liable. In the latter case the Court of Exchequer has held, that the costs occasioned by an action against the contractee, on such liability, were not recoverable over, Penley v. Watts, 7 M. & W. 601; where a lessee who had made an under-lease containing covenants not precisely the same with those in the original lease was held not to be entitled to recover from his under-lessee the costs of an action brought against him by his own lessor for the breach of the covenants in the original lease, and some reflections were both in that case and in Walker v. Hatton, 10 M. & W. 249, which affirms it, cast upon Neale v. Wylie, 3 B. & C. 533, which may be considered as finally overruled by Logan v. Hall, 4 C. B. 598, where it was holden that a lessee, who had been evicted for breach of covenant, could not recover the value of the lease from his sublessee, whose sublease did not contain any covenants the performance of which would necessarily have included a performance of the covenants in the original lease. See Sedgwick on Damages, 325; Hornby v. Cardwell, 8 Q. B. D. 329, 333; 51 L. J. Q. B. 89; Pontifex v. Foord, 12 Q. B. D. 152; 53 L. J. Q. B. 321.

On the same ground as the liability of a principal to reimburse his surety depends the right of one surety or joint contractor who has been obliged to satisfy the whole demand to recover a proportionable contribution from his fellow surety or contractor. He is a person who has been compelled to satisfy a demand,

parcel of which his fellow was compellable to satisfy, Cowell v. Edwards, 2 B. & P. 268; Turner v. Davies, 2 Esp. 478; Browne v. Lee, 6 B. & C. 697; Deering v. Winchelsea, 2 B. & P. 270; Kemp v. Finden, 12 M. & W. 421 and Reynolds v. Wheeler, 10 C. B. N. S. 561; 30 L. J. C. P. 350; so of co-sureties, bound by separate instruments, Whiting v. Burke, L. R. 10 Eq. 539, 6 Ch. 342]; though, indeed, if one have become surety at the instance of the other, particularly if that other have received from the principal a separate indemnity for himself, it will be different, Turner v. Davies; see Thomas v. Cook, 8 B. & C. 728. A surety's right to reimbursement from the principal accrues, totics quoties, as often as he is compelled to make a payment; that to contribution from a surety does not accrue till it is ascertained that one surety has paid more than his just proportion of the debt, after which it accrues, toties quoties, on the occasion of each payment that he is subsequently forced to make, Davies v. Humphreys, 6 M. & W. 168 [followed in Ex parte Snowdon, 17 Ch. D. 44; 50 L. J. Ch. 540]. And he may recover contribution according to the number of sureties, without reference to the number of principals, Kemp v. Finden, 12 M. & W. 421. In equity the solvent sureties are liable to contribute inter se to the whole amount, Peter v. Rich, 1 Cha. R. 19; Hole v. Harrison, 1 Cha. Ca. 246; Layer v. Nelson, 1 Vern. 456 | whereas at law the proportion recoverable seems to have been determined by the number of original sureties, see per Bayley, J., in Browne v. Lee, 6 B. & C. 697; Baturd v. Hawes, 2 E. & B. 287; but this is probably a case which would fall within the enactment of 36 & 37 Vict. c. 66 (The Judicature Act), s. 25, subs. 11, That where the rules of law and equity conflict the latter shall prevail]. See, as to the right of a joint contractor to contribution, Lord Kenyon's judgment in Merryweather v. Nixan, 8 T. R. 186, and post, vol. 2; Abbott v. Smith, 2 Bl. 947; Hutton v. Eyre, 6 Taunt. 289; Bayne v. Stone, 4 Esp. 13; Burnell v. Minot, 4 Moore 340; Holmes v. Williamson, 6 M. & S. 158 [and Batard v. Hawes].

Where several have employed another to do work for their common benefit, there is an implied undertaking by all to contribute ratably inter se, Edger v. Knapp, 6 Scott, N. R. 707 [S. C., 5 M. & G. 755; Spottiswoode's Case, 6 De G. Mac. & G. 345]. And where, by the nature of the case, the representative of any party dying is to have the same benefit as the deceased would have had if he had lived, the law will imply the like promise on the part of the deceased, that his representative shall contribute, notwithstanding that he is under no direct liability in a court of law, to the common creditor, Prior v. Hembrow, 8 M. & W. 873 (Nota. The count was in the indebitatus form for money paid to the use of the executor, ib.) [and see the judgment in Batard v. Hawes, 2 E. & B. 296. It is otherwise, indeed, where the joint contractors are partners, for then justice could not be done between them without balancing the partnership accounts, which is the office of a court of equity, Saddler v. Nixon, 5 B. & Ad. 936; unless the partnership was merely in an isolated transaction, Wilson v. Cutting, 10 Bing. 436 for the transaction was separate from the partnership, Sedgwick v. Daniell, 2 H. & N. 319; and see French v. Styring, 2 C. B. N. S. 357; 26 L. J. C. P. 181.

Here may be mentioned the new remedy at law given to sureties in cases in which the creditor, whose demand has been satisfied, holds securities against the principal debtor or against the parties liable to contribute. By the 5th section of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), it is provided that "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect

of such debt or duty, whether such judgment, speciaty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, upon a proper indemnity, to use the name of the creditor in any action or other proceedings at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceedings by him: Provided always, that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned persons shall be justly liable." This enactment extends to the case of a co-defendant who pays the whole of the debt recovered against all the defendants jointly, and entitles him to an assignment of the judgment, Batchellor v. Lawrence, 9 C. B. N. S. 543; 30 L. J. C. P. 39. On a refusal to assign, the proceeding must not be by motion, Phillips v. Dickson, 8 C. B. N. S. 391].

No action for contribution is maintainable by one wrongdoer against another, although the one who claims contribution may have been compelled to satisfy the whole damages arising from the tort committed by them both. This was decided in Merryweather v. Nixan, 8 T. R. 186 [post, vol. 2]. There, Starkey, having brought an action on the case against Merryweather and Nixan for an injury done by them to his reversion, levied the whole damages, amounting to 8401., upon Merryweather, who thereupon sued Nixan for a contribution: the plaintiff was non-suited on the ground that such an action lay not between wrongdoers; and the court afterwards held the nonsuit proper. Lord Kenyon, in his judgment, having laid down the general principle, observed, that "the decision would not affect cases of indemnity where one man employed another to do acts not unlawful in themselves, for the purpose of asserting a right." "From the inclination of the court, in Phillips v. Biggs, Hard. 164, from the concluding part of Lord Kenyon's judgment in Merryweather v. Nixan, and from reason, justice, and sound policy, the rule that wrongdoers cannot have contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." Per Best, C.J., in Adamson v. Jervis, 4 Bing. 72. Accordingly in Betts v. Gibbons, 2 A. & E. 57, such an action was held to be maintainable. There, the defendant consigned to the plaintiffs ten casks of acetate of lime, for Nyren and Wilson, two of which were delivered, but the remaining eight continued in the plaintiffs? hands up to the time of Nyren and Wilson's bankruptcy, on which the plaintiffs, by the defendant's orders, refused to deliver them to the assignees, who brought an action of trover, which the plaintiffs compromised by paying the value of the casks, together with the costs, and brought this action against the defendants for indemnity. They were held to be entitled to recover. "The principle laid down in Merryweather v. Nixan," said Taunton, J., "is too plain to be mistaken. The law will not imply an indemnity between wrongdoers. But the case is altered where the matter is indifferent in itself, and when it turns upon circumstances whether the act be wrong or not. The act done here by changing the destination of the goods at the order of the defendant, was not clearly illegal; and, therefore, not within the rule in Merryweather v. Nixan: accord. Humphreys v. Pratt, 2 Dow. & Cl. 288; Pearson v. Skelton, 1 M. & W. 504; Fletcher v. Harcot, Hutt. 55; S. C. as Battersey's Case, Winch 48. [Dugdale v. Lovering, L. R. 10 C. P. 196; 44 L. J. C. P. 197. In *Dixon* v. *Fawcus*, 30 L. J. Q. B. 137, the defendant gave the plaintiff an order to make a quantity of firebricks, and to impress them with a mark which the defendant knew, but the plaintiff did not know, to be the trade-mark of one Ramsay. The bricks were made, and marked according to the order, and thereupon Ramsay commenced a suit in Chancery for an injunction against the plaintiff, who, after incurring expenses about the defence to the suit, compromised the matter by paying Ramsay a certain amount, and then brought an action to recover that amount and the expenses so incurred, charging the defendant with fraud in having directed him to put the trade-mark on the bricks; on demurrer to the declaration, the action was held to be maintainable.]

In Colburn v. Patmore, 4 Tyrwh. 677; 1 C. M. & R. 73, the proprietor of a newspaper sued his editor for falsely, maliciously, and negligently inserting a libel therein, without the knowledge, leave, or authority of the plaintiff, "in consequence of which the plaintiff was convicted and fined for falsely and maliciously printing and publishing the said libel." The case was determined against the plaintiff on a slip in the pleading, the court being of opinion, that it was consistent with the statement in the declaration, that the plaintiff, though he did not know of the original insertion of the libel, might afterwards have knowingly and wilfully permitted it to be printed, and so have been convicted in consequence of his own criminal act, and not of that of the defendant. But, during the argument, the question whether a newspaper proprietor, convicted and fined in consequence of the publication of a libel by his editor without his knowledge or consent, could maintain an action for indemnity, was elaborately discussed at the bar, and the court in delivering judgment expressed a strong opinion that he could not. "I am not aware," said Lord Lyndhurst, C. B., "of any case in which a man convicted of an act declared by law to be criminal, and punished for it accordingly, has been suffered to maintain an action against the party who participated with him in the offence, in order to procure indemnity for the damages occasioned by that conviction; but, after hearing the argument, I entertain little or no doubt that such an action could not be maintained." (See Shackell v. Rosier, 2 Bing. N. C. 634.)

Perhaps this case may be thought to involve considerable hardship. proprietor of a newspaper is, for the security of the public, rendered the single exception to that otherwise universal rule of law, that a master shall not be criminally responsible for the act of his servant, done without his knowledge or authority. See Rex v. Gutch, M. & M. 433. His liability to the indictment is, as Lord Lyndhurst expressed it, "an anomaly." Admitting that it would also be an anomaly, that a man convicted of a crime should recover indemnity: still, if one anomaly be permitted in the law in order to convict him; may not another anomaly be introduced in order to indemnify him? It is hard to consider the case anomalous as against the proprietor, and refuse to treat it as such in his favor. If there be one case only in which a man, morally innocent, may be convicted of a crime, should there not be a corresponding exception to the rule which debars persons so convicted from indemnity? It has been said that his liability to the indictment proceeds upon the ground that the law presumes him to be cognizant of the libel. In presumptione juris consistit æquitas. But what equity is there in continuing such a presumption after its object, namely, the protection of the public, has been satisfied? And that, too, when the effect of doing so is to exempt the person morally guilty from punishment, at the expense of the person morally innocent, for the defendant in the action for indemnity must always be one who has published the libel knowingly, wilfully, and without the knowledge or consent of the proprietor. [The anomaly itself

has been mitigated by the provisions of the 6 & 7 Vict. c. 96, s. 7, which enables the proprietor to prove "that the publication was made without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part." See, on this section, Reg. v. Holbrook, 3 Q. B. D. 60 & 4 Q. B. D. 42.]

In Campbell v. Campbell, 7 Cl. & Fin. 181, it appeared that the appellant and respondent and others were partners in a distillery, and that in the case of certain illegal transactions which took place in the management of the distillery by one of the partners, the whole firm, including the pursuer, though absent and ignorant of the delict, became liable to penalties. A prosecution was commenced, and the firm, including the pursuer, consented to a verdict against them for 3000l. penalties. The pursuer, after payment of the penalty, brought the action for an indemnity, which was opposed inter alia on the ground that he was particeps criminis, and therefore disentitled; and Colburn v. Patmore, supra, was cited. However, although no decision was pronounced upon the point, Lord Cottenham, C., seems to have thought it clear, that the pursuer, though liable to the penalty, was not particeps criminis in the sense which would disentitle him to sue for contribution.

[A judgment against one of two tort feasors, although unsatisfied, is a bar to an action against the other for the same cause. *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547, 41 L. J. C. P. 190.]

In *Hunter* v. *Hunt*, 1 C. B. 300, an unsuccessful attempt was made to extend the limits of the action for contribution. In that case, the plaintiff and defendant were under-lessees by different leases and of distinct parcels of premises, held under one original lease at an entire rent, which being in arrear and paid by the plaintiff under a threat of distress, he brought his action against the defendant to recover a contribution proportionate to his interest, as for money paid to his use. The Court of Common Pleas, however, held the action not maintainable.

Under the same principle, viz., that a previous request, and a promise to indemnify, will be implied in favor of a plaintiff, who has been compelled to do that to which the defendant was legally compellable, may be ranked the cases in which a tenant, who has been forced to pay some demand to which the landlord was primarily liable, has been held entitled to deduct the amount from his rent, or to recover it again from the landlord, as money paid to his use. Such was Taylor v. Zamira, 6 Taunt. 524; that was an action of replevin, in which the defendant made cognizance as bailiff of Carpue for 81, 15s., being a quarter's rent, under a demise at 35l. per annum. The plaintiff pleaded in bar, that, before that demise, Rideout and Tothill were seized each of an undivided fourth part of the premises, and severally demised the same for terms of 99 years to S. S. Still; who assigned them to Tucker; who, before the demise by Carpue, and before that person had any interest in the premises, granted an annuity of 102l. 16s. per annum, issuing out of the said two undivided fourth parts, to Mary Knowles, with power of distress: that afterwards, and before the time when, &c., a sum exceeding the arrears mentioned in the cognizance, viz. 2051. 128., fell due to M. Knowles, who demanded payment from the plaintiff, and threatened to distrain on him; whereupon, in order to prevent his goods from being distrained, the plaintiff paid 8l. 15s. (the rent mentioned in the cognizance) in part payment of the annuity. The plea was held good: Gibbs, C. J., remarking, that Sapsford v. Fletcher, 4 T. R. 511, was decisive that a tenant, threatened with distress for rent due to a superior landlord, might pay it, and deduct the payment from his own rent; that the only difference was, that there his immediate lessor was personally liable to that rent, and that here the land only was

liable, but that nothing could turn on that distinction. And Burrough, J., said that, had the payment by the plaintiff exceeded the rent due from him, he might have brought assumpsit against the defendant for the surplus.

In Sansford v. Fletcher, 4 T. R. 511, above referred to, a tenant, to an avowry for rent arrear, pleaded a payment under threat of distress, of groundrent to the superior landlord. It was urged, 1st, that this amounted to a set-off, and was not pleadable in replevin; 2d, that this was a payment by the tenant in his own wrong, for that no man can make another his debtor by voluntarily paying the debt of that other. But the court said, it was not a set-off, but a payment; and that the payment was not voluntary, but compulsory, for it was made under threat of distress, which the superior landlord had it in his power to levy. In Johnson v. Jones, 9 A. & E. 809, the same principle was applied to a payment of interest due upon a mortgage prior to the lease; though in Boodle v. Cambell, 8 Scott, N. R. 104; S. C., 7 M. & G. 386; a payment by a tenant of a proportional part of the rent to a person claiming part of the demised premises by title paramount to the landlord, and who demanded the rent after it fell due, so that there was nothing in the case that could be considered as an eviction, was held no answer to the landlord's action for rent, not being a payment of any charge upon the land, or of any debt due from the landlord. In Baker v. Greenhill, 3 Q. B. 148, it was holden, that where lands charged with the repair of a bridge were occupied by a person not the owner, the occupier, although primarily responsible to the public for the repairs, was entitled to reimbursement from the owner. Nor is it necessary, for the purpose of rendering the payment one by compulsion, that the superior lord should actually threaten to distrain; for a demand by one who has power to distrain is equivalent to a threat of distress; and such a payment, to use the words of Best, C. J., is no more voluntary than a donation to a beggar who presents a pistol. Carter v. Carter, 5 Bing, 406; Acc. Pitt v. Purssord, 8 M. & W. 538.

It was stated, as has been already observed, by Burrough, J., in Taylor v. Zamira, that, if the payment made by the tenant to the head landlord had exceeded the sum due from him to the lessor, he might have sued his lessor in assumpsit for the surplus. This is a corollary from the general rule we are discussing, riz. that if A. be compelled to pay the debt which B. is legally compellable to satisfy, A. may sue B. for the amount, and the law implies a previous request from B. to A. to pay the debt, and a subsequent promise to reimburse him. It seems unnecessary that there should even be a demand by the person to whom the money is paid, if there be in him a legal right, by the exercise of which the person who pays may be damnified, unless he satisfy it. Broughton's Case, 5 Rep. 24 a, seems to support that proposition, and with an excellent reason, from the Year Book of 18 E. 4, 27 b, namely, "that terror of suit, so that he dare not go about his business, is a damnification, although he be not arrested or forced by process," &c. See also Pitt v. Purssord, 8 M. & W. 538; Gibbons v. Vouillon, 8 C. B. 483. Indeed, in Schlencker v. Moxey, 3 B. & C. 789, where a lessee by deed, who had been distrained upon for ground rent, declared against his lessor, on an implied promise to indemnify, it was held that the covenant for quiet enjoyment by the word demise excluded such an implication. And the word grant has been held to have a similiar effect, and to exclude the tenant's right to sue for money paid. Baber v. Harris, 9 A. & E. 532; quære since 7 & 8 Vict. c. 76, s. 6, and 8 & 9 Vict. c. 106, s. 4. See ante, p. 79.

In Moore v. Pyrke, 11 East, 53, the general principle was not disputed; but the action failed, because the plaintiff, instead of paying the rent to the superior landlord, had suffered his goods to be distrained and sold, so that, in fact, he never had paid any money to the defendant's (his lessor's) use; and, as the

declaration was for money paid, he failed; a reason which seems not to have been approved of by the Court of Exchequer in the case of Rogers v. Maw, 15 M. & W. 444, where the goods of a joint contractor were taken under a fieri facias.

[In Griffenhoofe v. Daubuz, Cam. Scacc. 5 E. & B. 746, the question was whether an action could be maintained to recover indemnity from the owner of land for the loss of a stack of wheat belonging to the plaintiff, and which, "while lawfully upon the land," had been distrained upon and sold for arrears of a tithe commutation rent charged upon the land, but not upon the landowner personally. It was held that the action would not lie, there being no facts shown sufficient to establish any privity between the plaintiff and the defendant. This case was explained in Edmunds v. Wallingford, 14 Q. B. D. 811; 54 L. J. Q. B. 305; where the Court of Appeal express their inability to appreciate what is meant by privity as there used, and point out that as between the plaintiff and the defendant the plaintiff might well have been the person liable to pay the rent-charge.] In Exall v. Partridge and others, 8 T. R. 308, the plaintiff, a stranger, placed his carriage [under the care of the defendant Partridge, a coachmaker] on premises which [Partridge and the two other defendants] rented from Welch for a term of years; the other two had transferred their interest to their co-lessee; but there was a covenant by all three to pay rent, so that all continued liable to Welch, the head landlord. Welch having distrained the carriage for rent, the plaintiff paid the arrears in order to release it, and was allowed to recover the amount from the defendants in an action of assumpsit for money paid. "One person," said Lawrence. J., in his judgment in that case, "cannot by a voluntary payment raise an assumpsit against another; but here was a distress expressed for rent due from the three defendants; the notice of distress expressed the rent to be due from them all, the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion; therefore, I am of opinion that this action may be maintained against the three defendants. The justice of the case, indeed, is that the one who must ultimately pay this money should alone be answerable here. But as all the three defendants were liable to the landlord for the rent in the first instance, and as, by this payment made by the plaintiff, all the three were released from the demand of rent, I think that this action may be supported against all of them."

The above words are printed in *italics* because there is a distinction between this case and the case where one person is compelled to make a payment to which another is liable, not, however, primarily, but only in consequence of a special agreement with the party who is forced to make it; the remedy in such case not being on any implied assumpsit, but on the special agreement itself: thus in Spencer v. Parry, 3 A. & E. 331, the defendant took a house from the plaintiff, and agreed to pay certain taxes, which were by statute payable by the landlord. The plaintiff, having been compelled to pay these taxes in consequence of the defendant's default, brought an action of debt for money paid against him. It was objected that he ought to have sued upon the special agreement, and the court held the objection fatal. "The plaintiff's payment," said the Lord Chief Justice, delivering judgment, "delivered the defendant from no liability but what arose from the contract between them, the tax remained due by his default, which would give a remedy on the agreement, but it was paid to one who had no claim upon him, and therefore not to his use." Accord. Lubbock v. Tribe, 3 M. & W. 607, which was decided on the authority of Spencer v. Parry. In Lubbock v. Tribe the defendant gave a check for money due from him to the K. Co.; the plaintiffs received it as the company's agents; it was afterwards lost, and the plaintiffs agreed with the defendant that he should give them a new check on their giving him an indemnity. No new check was given; but the plaintiffs,

having been obliged to pay the amount to the company, brought an action against the defendant for money paid, which was held not to be sustainable. "On the special agreement," said Parke, B., "I think an action might be maintained, but not for money paid, because the payment of the money does not exonerate the defendant from any liability at all. It is not money paid to his use, it is money paid to the plaintiffs' own use, who are bound to make good the amount to the K. Company."

But in a previous case, in which the compulsory payment was made in discharge of a party, who, though not primarily liable, was ultimately so, not by any special agreement, but by the provisions of an Act of Parliament, it was decided, that the party compelled to make the payment might recover on an implied assumpsit. In Dawson v. Linton, 5 B. & A. 521, goods of the plaintiff, an outgoing tenant, left by him on his farm, were distrained for a tax payable by the tenant, but which the Act gave him power to deduct from his rent: the court decided, that, as the tax must ultimately fall on the landlord, and as the plaintiff had been compelled to pay it in order to ransom his goods, he had a right to recover the amount from the landlord, as money paid to his use. It may, perhaps, be thought that the payment in this case is liable to the concluding observation of the court in Spencer v. Parry, that "it was made to one who had no claim upon the defendant and therefore not to his use." But though, in Dawson v. Linton, there was no claim for the tax against the defendant personally, there was a claim against the land which was his property; nay, there was one contingency, riz. that of there being no sufficient distress, in which the Act provided that the land itself might be seized quousque for the arrears due; and Taylor v. Zamira shows that a claim against a man's property is equivalent, for this purpose, to one against his person; but in Spencer v. Parry, the defendant had quitted the premises, so that neither he nor his property could have been molested on account of the tax, at the time when the plaintiff paid it.

The doctrine laid down in *Spencer* v. *Parry* is obviously inapplicable to the case where a liability has been incurred at the request of the defendant, and in consequence of incurring such liability the plaintiff has been put to expense; because, in such a case, the payment has in truth been made in consequence of the request of the defendant, and it is immaterial whether it has relieved the defendant from a liability or not, *Brittain* v. *Lloyd*, 14 M. & W. 762 [per Parke, B., in *Hutchinson* v. *Sydney*, 10 Exch. 438; *Risbourg* v. *Bruckner*, 3 C. B. N. S. 812]. See also *Hawley* v. *Beverley*, 6 M. & Gr. 221.

It may be mentioned in connection with this subject that it has been held by the Court of Exchequer that a parol demise implies a contract for quiet enjoyment, but not for title. Band v. Cartwright, 8 Exch. 913 [Acc. Hall v. City of London Brewery, 2 B. & S. 737, 31 L. J. Q. B. 257; and see Penfold v. Abbott, 32 L. J. Q. B. 67]. And it does not disentitle a tenant to be saved harmless from proceedings for rent payable by his landlord, that his own rent is in arrear. Briant v. Pilcher, 16 C. B. 354.

Here we must not omit to remark that there is a peculiarity in the right of the tenant to recoup himself for moneys paid in the discharge of some burden upon the land, prior to his own interest therein, which distinguishes that from all other cases of compulsory payment to the use of another. Such payments, when made by a tenant under compulsion, are considered as actual payments of so much of his rent, and may be pleaded by way of payment, as contradistinguished from set-off (see Taylor v. Zamira, and Sapsford v. Fletcher, supra, and Johnson v. Jones, 9 A. & E. 809); whereas, generally speaking, one who has been compelled to pay the deman to which another is liable, although he may recover the amount in assumpsit, or set it off in an action against himself,

cannot appropriate it to the payment of a debt due by him to the person to whose use he paid it, without obtaining that person's consent. The fact is, that, in cases of landlord and tenant, the very relation in which the parties stand to each other creates an implied consent, upon the landlord's part, that the tenant shall appropriate such part of his rent as shall be necessary to indemnify him against prior charges, and that the money so appropriated shall be considered as paid on account of rent; but this implication is liable to be rebutted, for if the landlord were afterwards to repay the tenant the money paid by him in respect of the charge, he might recover the entire rent, eo nomine, without any deduction. All this is well explained by Buller, J., in Sapsford v. Fletcher. "There is a great difference," says his lordship, "between a payment and a set-off; the former may be pleaded to an avowry, though the latter cannot. That is a good payment which is paid as part of the rent itself in respect of the land, but a set-off supposes a different demand, arising in a different right. It was said, that if the tenant had paid the ground-rent, and the landlord had afterwards repaid him, the latter could not avow for the whole rent; and my answer is this, that the payment there never was considered by both as a payment, and, if not, the whole rent remains due. I consider this case as a lease from the defendant to the plaintiff, at the annual rent of 50l., out of which 5l.per annum was to be paid to the ground landlord; and therefore a payment of that ground-rent is a payment of so much rent to the defendant, and may be pleaded in answer to the avowry for rent. Neither can we suppose, upon this record, that the defendant ever repaid the plaintiff this ground-rent, for, if he had, he might have replied that fact." The landlord, therefore, generally speaking (for in some cases it is taken from him by statute), has the option of repaying the tenant the sum disbursed by him to discharge the prior claim upon the land, and may thus prevent the disbursement from being considered as a payment of so much of the rent: and the tenant may, in like manner, elect not to consider it as such, and may signify his election by bringing an action for the amount, or setting it off in an action brought by his landlord against him for any other debt. And, indeed, in some cases he must do so; for if he owe no rent or not enough to cover the sums he has been forced to pay, he has no other means of reimbursing himself.

It is, however, necessary to remark, that there are some cases which qualify the generality of the doctrine just laid down, by compelling the tenant to avail himself of his right to deduct within a given period, if at all. The property-tax, by 46 Geo. 3, c. 64, was directed to be paid by the occupier, who was required to deduct it out of the next rent. In Denby v. Moore, 1 B. & A. 123, the plaintiff occupied land, and paid the property-tax for about twelve years, and also paid the full rent during that time, and it was held that he could not recover back again the amount of rent thus overpaid. This case, indeed, was decided upon grounds not much akin to the subject of this note, for the action was for money had and received to recover back the rent overpaid, not for money paid to the defendant's use on account of property-tax. And the court thought that, as the occupier had made the overpayments with full knowledge of the facts, he could not recover them back again; besides, the words of the Act were express, requiring the occupier to deduct the tax from the rent next due, and there were good reasons for insisting on his doing so. And therefore, in Stubbs v. Parsons, Bayley, J., said, "that he laid Denby v. Moore out of the question, that decision being on the express words of the Property Act to prevent frauds on the revenue." Andrew v. Hancock, 1 B. & B. 37, was, like Sapsford v. Fletcher, an action of replevin, and, the defendant having avowed for six months' rent due the 29th of September, 1818, the plaintiff pleaded in bar various payments of

land-tax and paying rates made to prevent his goods from being distrained between 1812 and 1818, while he was tenant to the defendant, which payments he claimed to deduct from the rent avowed for. The plea was decided to be bad; principally, however, upon the express words of the Acts of Parliament, by which, to use the words of Dallas, C. J., the tenant was not only allowed, but required, to deduct these payments out of the rents of the then current years. In Stubbs v. Parsons, 3 B. & A. 516, a similar question again arose with respect to land-tax, that also was an action of replevin, cognizance for a quarter's rent due the 25th of March, 1819. The plaintiff pleaded a tender as to part, and as to the residue, that before the 25th of March, and before the said time when, &c., divers sums, amounting to the residue, had been from time to time assessed on the premises for land-tax, which he had been compelled to pay. On demurrer the plea was held bad, because it did not state when the land-tax claimed to be deducted was assessed or paid; and it was consistent with the plea that it might have been a payment for land-tax due before the rent distrained for either accrued or was accruing, or even before the commencement of the present landlord's title. "The ground," said Bayley, J., "on which my judgment proceeds is, that a payment of the land-tax can only be deducted out of the rent which has then accrued, or is then accruing due; for the law considers the payment of the land-tax as a payment of so much of the rent then due, or growing due, to the landlord. And if, afterwards, he pays the rent in full, he cannot at a subsequent time deduct that overpayment from the rent. He may, indeed, recover it back as money paid to the landlord's use." "The occupier," said Holroyd, J., "has a lien on the next rent, given him by the legislature, for the land-tax paid by him; but if he parts with the rent without making the deduction, he loses his lien, and has only his remedy by action or set-off." The same rule has been applied to payments of property-tax, Cumming v. Bedborough, 15 M. & W. 438 [and of expenses under the Metropolitan Building Act, Earle v. Maughan, 14 C. B. N. S. 626].

The next question is, whether the limitation in point of time established by these cases, with respect to deductions of land-tax, applies to deductions in respect of rent paid, under dread of distress, to the superior landlord, or in respect of arrears of a rent-charge. In order to solve this question we cannot have recourse, as in case of taxes, to the express words of the legislature; we must, therefore, resort to principles of common sense and general convenience. And it seems not unreasonable, that if a tenant having made such payments fails to deduct at the next opportunity, he should be taken to have abandoned his right to do so, and to have elected to rely upon his right of action for money paid to the landlord's use; and, indeed, Parke, J., in Carter v. Carter, 5 Bing. 409, 410, appears to have considered that this point was decided by Andrew v. Hancock, to which he refers as to a case of ground-rent. Yet it would be hard to preclude the tenant from deducting from any rent not actually due or accruing at the time of his making the payments in respect of which he claims the right of deduction; for the arrears of rent-charge or head-rent may be extremely heavy, and may cover much more than the amount of the rent then due or accruing from him to his landlord. In order, therefore, to do full justice, he ought to be allowed, after making such a payment, to retain the rent for as many succeeding rent-days as may be necessary to place him in statu quo, for he cannot prescribe to the head landlord or incumbrancer when to insist on payment, and therefore ought not to suffer by their delay.

But it seems reasonable, that the tenant's right to deduct should only exist in respect of payments made by him of arrears which accrued due in the time of the landlord against whom he claims the deduction. Suppose, for instance,

premises be let for 100*l*. a year, and subject to a head-rent of 10*l*. a year, of which five years are in arrear when the mesne landlord assigns his reversion: upon the sixth year falling due the head landlord threatens to distrain, and the tenant is obliged to pay him 60*l*.: shall he deduct the whole of that sum from his current year's rent, or only the 10*l*. which fell due during his present land-lord's time? It would be hard upon the assignee to adopt the former part of this alternative.

The right to deduct a payment in respect of ground-rent has not been confined to tenants, for in *Doe* v. *Hare*, 4 Tyrwh. 29 [S. C., 2 C. & M. 145], the plaintiff having recovered in ejectment on a demise from the 5th of June, 1830, brought an action for the mesne profits between that day and the 4th of June, 1832, when the sheriff executed the *ha. fa. po*. The defendant was allowed, in reduction of damages, a payment in respect of ground-rent which had become due the 24th of June, 1830, and also two other payments of ground-rent which fell due during his occupation. [In the modern case of *Barber* v. *Brown*, 1 C. B. N. S. 121, the principle of *Doe* v. *Hare* was acted on. In that case the owner of the reversion expectant upon a term out of which an under-lease *pur autre vie* had been granted, having become tenant from year to year to the under-lessees, and having, by mistake, after the dropping of the lives, continued to pay rent to the representatives of the under-lessees, it was held, in an action brought by him against them to recover the amount so paid, that they were entitled to deduct payments of ground-rent, and also of rates and taxes.

Another instance of the principle discussed in this note is furnished in the case of assignees of leases subject to covenants. Thus, where there have been several assignments, and damages have been recovered by the lessor from the original lessee for breaches of covenant committed during the term, there is an implied contract on the part of each successive assignee to indemnify the original lessee in respect of breaches committed during the period of such assignee's occupation. *Moule* v. *Garrett*, L. R. 5 Exch. 132, 41 L. J. Ex. 62, and per Parke, B., in *Penley* v. *Watts*, 7 M. & W. 608.

Upon a similar principle, in Walker v. Bartlett, Cam. Scace., 18 C. B. 845, it was held that the buyer of shares in a mining company had impliedly promised to indemnify the seller against calls made on him subsequently to the sale, and to which he was liable by reason only of the omission on the part of the buyer to cause himself, or some one else, to be registered as owner of the shares. And for the like reasons a transferor on the B. list of contributories to a company in liquidation who has been made to pay calls may recover the amount from his transferee on the A. list. Nevill's Case, L. R. 6 Ch. 43, 40 L. J. Ch. 1; Roberts v. Crowe, L. R. 7 C. P. 629, 41 L. J. C. P. 198; Kellock v. Enthoven, L. R. 8 Q. B. 458, 9 Q. B. 241, 43 L. J. Q. B. 90, for "This is a principle of law which applies in all cases where one who is only secondarily liable performs under compulsion of law an obligation for which another person is primarily liable." Per Willes, J., Roberts v. Crowe, at p. 637.

For those cases arising out of sales of shares in which, admitting the original seller's right to an indemnity, as established by Walker v. Bartlett, supra, the question has been from whom, according to the custom of the Stock Exchange, such indemnity may be recovered. See Grissell v. Bristowe, L. R. 4 C. P. 36, 38 L. J. C. P. 10; Maxted v. Paine, L. R. 6 Ex. 132, 40 L. J. Ex. 57; Castellan v. Hobson, L. R. 10 Eq. 47, 39 L. J. 490; Merry v. Nickalls, L. R. 7 Ch. 734, 41 L. J. Ch. 767.]

Consideration.—A promise, oral or written, made without consideration is void, and no action can be maintained upon it. And in order to support an action to enforce an executory contract the law requires that the consideration thereof be valuable. Some loss, or inconvenience, or detriment suffered by the promisee upon his entering into the contract, or some benefit or advantage accruing to the promisor, is deemed a valuable consideration; Conmey v. Macfarlane, 97 Penn. St. 361; Amherst Academy v. Cowls, 6 Pick. 427. "It is sufficient that something valuable flows from the person to whom it is made, and that the promise is the inducement to the transaction." Marshall, C. J., in Violett v. Patton, 5 Cranch 142; Buchanan v. International Bank, 78 Ill. 500; White v. Baxter, 71 N. Y. 254; Molyneux v. Collier, 17 Ga. 46; Conover v. Stillwell, 34 N. J. Law 54; Hubbard v. Coolidge, 1 Met. 84.

Mutual promises. — One promise is a legal consideration for another. If a promissory note is made by A. to B. in exchange for a promissory note made by B. to A., each note is a valid consideration for the other whether between the original parties or between one of them and an indorsee; Backus v. Spalding, 116 Mass. 418; Cooke v. Murphy, 70 Ill. 96; Clodfelter v. Hulett, 72 Ind. 137; Ayres v. C., R. I. & P. R. R., 52 Ia. 478; Kimmins v. Wilson, 8 W. Va. 584; Hubon v. Park, 116 Mass. 541; Appleton v. Chase, 19 Me. 74; George v. Harris, 4 N. H. 533; Keep v. Goodrich, 12 Johns. 397. It is not necessary, however, that the mutual promises be directly proved, provided they can fairly be presumed; Hubbard v. Coolidge, ubi sup. Reciprocal promises of marriage are each a valid consideration for the other, and even a voidable promise is a good consideration to support a counter-promise. But a void promise, or a promise to do what the promisor is under legal obligation to do, is not; Crowder v. Reed, 80 Ind. 1, 13. Promises, in order to be mutual, must be contemporaneous or they are not a consideration one for the other, Tucker v. Woods, 12 Johns. 190; and if not so alleged in the declaration, judgment will be arrested, Livingston v. Rogers, 1 Caines 583.

While the courts will not, in general, where no fraud is suspected, inquire into the adequacy of the consideration, Lawrence v. McCalmont, 2 How. 426; Hubbard v. Coolidge, ubi sup.; Newhall v. Paige, 10 Gray 366; Knobb v. Lindsay, 5 Ohio 468; Franklin v. Osgood, 14 Johns. 527; Seymour v. Delancy, 3 Cow.

445, yet some value, however small or nominal it may be, must be given or stipulated for. Therefore the surrender of an invalid contract, which is of no value whatever, forms no valid or legal consideration for a substituted promise; Marie v. Garrison, 83 N. Y. 14; Handrahan v. O'Regan, 45 Ia. 298; Mayer v. Child, 47 Cal. 142. So a promise to pay a debt already existing is a mere nudum pactum, and its only effect is to cut off and exclude from the period of limitation the time that had elapsed when the new promise was made; Gilmore v. Green, 14 Bush 772; Keffer v. Grayson, 76 Va. 517. Nor, as before stated, is a promise to do what one is under legal obligation to do a sufficient consideration for a promise, Crowder v. Reed, 80 Ind. 1; Ogden v. Redd, 13 Bush 581.

Natural love and affection.— Natural love and affection is not a sufficient consideration for an executory contract, nor, except as between the parties thereto, for a deed or executed contract; Fink v. Cox, 18 Johns. 145. Where, therefore, through the desire of a testator to rectify inequalities in the provisions of his will, he gave his sister a note payable after his decease, it was held that there was no consideration to support it; West v. Cavins, 74 Ind. 265. So it is an insufficient consideration upon which to warrant a decree for specific performance of an agreement to convey land; Keffer v. Grayson, ubi sup.

Moral obligation. — A mere moral obligation, or obligation resting only in foro conscientiæ of the debtor, will not support an express promise. The consensus of legal opinion in this country is that in order to support a promise to do an act binding in good morals a valuable consideration must, at some prior time, have existed, creating a legal duty or obligation which at the time of the promise is barred by some positive rule of law; Ellicott v. Peterson's Ex'ors., 4 Md. 476; Geer v. Archer, 2 Barb. 420; Mills v. Wyman, 3 Pick. 207; Hawley v. Farrar, 1 Vt. 420; Nash v. Russell, 5 Barb. 556; Cook v. Bradley, 7 Conn. 57. Therefore a preëxisting obligation, although fully and completely discharged by operation of law, as in the case of a debt barred by the statute of limitations, or by a discharge in bankruptcy, is yet a sufficient consideration for a new promise to pay, for in both these cases there was originally a quid pro quo, and according to principles of natural justice the party receiving ought to pay. There is a moral obligation founded upon an antecedent valuable consideration, and a promise in considera-

tion thereof has a sound legal basis; Mills v. Wyman, ubi sup. Where the sons of one who had received his discharge in bankruptcy afterward gave their note for the father's debt, incurred before the bankruptcy, it was held that they, being under no legal obligation so to do, were not bound to pay it; McElven r. Sloan, 56 Ga. 208. And where a preëxistent liability has been discharged by the act of the creditor himself, as by a release under seal, there no longer remains a legal obligation sufficient to support a new promise. Accordingly where A. granted a full release of B.'s indebtedness to him, and B. afterward gave his note for a part of such indebtedness, it was held that A. could not recover; Turlington v. Slaughter, 54 Ala. 195; Ingersoll v. Martin, 58 Md. 67; Wills v. Ross, 77 Ind. 1; Hendricks v. Robinson, 56 Miss. 694; Mason v. Campbell, 27 Minn. 54. Contra: Baeder v. Barton, 11 W'kly Notes Cas. 165: Willing v. Peters, 12 S. & R. 177. See Valentine v. Foster, 1 Met. 520. In order, however, to make the release binding, it must be under seal or founded on a valuable consideration; Weaver v. Fries, 85 Ill. 356. To enable one to recover a debt barred by a former recovery, there must be not only an acknowledgment of the debt, but a distinct and formal promise to pay it; Anspach v. Brown, 7 Watts 139. For a later case, where a moral obligation was held sufficient, though the debt was barred by a judgment, see Stebbins v. The County of Crawford, 92 Penn. St. 289. A debt barred by the statute of limitations is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is complete. "But in order to continue or to revive the cause of action, after it would otherwise have been barred by the statute, there must be either an express promise of the debtor to pay that debt, or else an express acknowledgment of the debt, from which his promise to pay it may be inferred. A mere acknowledgment, though in writing, of the debt as having once existed, is not sufficient to raise an implication of such a new promise. To have this effect there must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor; "Shepherd v. Thompson, 122 U.S. 231; Bangs v. Hall, 2 Pick. 368; Weston v. Hodgkins, 136 Mass. 326.

Gratuitous promises. — It follows naturally that if a promise founded upon a mere moral obligation cannot be enforced, still

less can a gratuitous or voluntary undertaking binding neither in law nor in conscience, as, for instance, a promise to pay money as a gift. Therefore, where a note was given by a father to a son in consideration of love and natural affection, it was held to be merely gratuitous and not enforceable; Fink v. Cox, 18 Johns. 145. So of a note given by a brother to his sister for the purpose of more effectually equalizing the distribution of their father's estate; Hill v. Buckminster, 5 Pick. 391; Parish v. Stone, 14 Pick. 198; McCarroll v. Reardon, 4 Allen (N. B.) 261. An agreement to accept in satisfaction of a liquidated debt a sum less than the full amount due, cannot be enforced unless there exist some consideration to support it other than the payment or promise of the debtor to pay such less sum. But the courts have been disposed to confine the operation of this rule to cases fully within the principle of want of consideration. Hence, if payment be, in a manner, collateral to the original obligation, as if it be paid before the day or be made by a stranger out of his money or by the note of a third person, though a smaller sum is paid than the amount of the debt, such sum thus received in discharge of the whole demand is a valid discharge thereof; Perkins v. Lockwood, 100 Mass. 249; Harriman v. Harriman, 12 Gray 341. An entry on the docket after judgment that the claim has been compromised for a smaller sum than the debt, is no bar to a recovery of the balance; Mitchell v. Sawyer, 71 N. C. 70; McKenzie v. Culbreth, 66 N. C. 534.

If, however, on the faith of a creditor's agreement to accept a part of his debt in full satisfaction, other creditors are induced to relinquish their demands on the debtor, or if several creditors join, mutually stipulating to withdraw or withhold suits, and that they will release to their common debtor a part of their claim upon payment of a certain other part, the agreement becomes binding between each creditor and the debtor, so that no creditor who thus agrees can recover the balance of his debt, as it would be a fraud on the other creditors and contrary to good faith; Curran v. Rummel, 118 Mass. 482; Perkins v. Lockwood, ubi sup.; Eaton v. Lincoln, 13 Mass. 424; Davenport v. First Congl. Society, 33 Wisc. 387. In Georgia, a written promise to pay \$200 in satisfaction of a claim for \$390 was supported on the ground that by such agreement the plaintiff was induced to forbear bringing suit on the original indebted-

ness until his claim was barred by the statute of limitations, and that the injury thereby suffered by the promisee was a sufficient consideration; Stovall v. Hairston, 55 Ga. 9. But it is to be noticed that in this case forbearance on the part of the plaintiff did not appear on the record, but was inferred by the court from the correspondence between the parties. An agreement, made in consideration that one will do or not do what it is his official or legal duty to perform or omit, is gratuitous and void; Padden v. Tronson, 45 Wisc. 126; Eblin v. Miller, 78 Ky. 371. See also Bennett v. Williams, 54 Ga. 525; Booth v. Wiley, 102 Ill. 84; Reid v. Degener, 82 Ill. 508; Rumberger v. Golden, 99 Penn. St. 34.

Subscriptions. — There are, however, certain undertakings, in their nature gratuitous, which have come considerably before the courts, and have been, in general, though on various grounds, sustained. These are gratuitous subscriptions. It has been decided that in order to enforce a gratuitous subscription to promote the objects for which a corporation is established, the promisee's acceptance of the promise must be shown either by express vote or contract, assuming a liability or obligation legal or equitable, or else by some unequivocal act, such as advancing or expending money, or erecting a building in accordance with the terms of the contract and upon the faith of the defendant's promise; Cottage St. M. E. Church v. Kendall, 121 Mass. 528, and cases cited; Baptist Education Society v. Carter, 72 Ill. 247; Stevens v. Corbitt, 33 Mich. 458; Wilson v. First Presbyterian Church, 56 Ga. 554; Philomath College v. Hartless, 6 Oregon 158. A subscription to stock made before the organization of the company will be enforced if the organization is afterwards perfected; Cross v. The Pinckneyville Mill Co., 17 Ill. 54. In Missouri it is held, Methodist Orphans' Home Assoc. v. Sharp, 6 Mo. App. 150, that gratuitous subscriptions for charitable purposes, without more, cannot be enforced for want of a valuable consideration.

The courts have labored, not without some difficulty, to find a sufficient consideration to support these undertakings, and in Stewart v. Trustees of Hamilton College, 2 Denio 403, Chancellor Walworth says, "The mutual promises of the several subscribers to contribute towards the fund to be raised for the specified object in which all feel an interest, is the real consideration of the promise of each. For

this purpose also, the various subscriptions to the same paper, and for the same object, although in fact made at different times, may, in legal contemplation, be considered as having been made simultaneously. The consideration of the promise, therefore, is not any consideration of benefit received by each subscriber from the religious or literary corporation to which the amount of his subscription is made payable, nor is his promise founded upon any consideration of injury which the payee has sustained, or is to sustain, or be put to for his benefit. But the consideration of the promise of each subscriber is the corresponding promise which is made by other subscribers. Mutual promises have always been held sufficient as between the parties to sustain the promise to each;" Amherst Academy v. Cowls, 6 Pick. 427, and cases cited; Watkins v. Eames, 9 Cush. 537; Christian College v. Hendley, 49 Cal. 347. But it may perhaps be open to question whether, on this reasoning, the court does not assume the very proposition which is to be proved. For the issue is whether any of the promises are binding. If one is, all, of course, are. If one is not, none are, and consequently they are void, and, as has previously been shown, one void promise is no consideration for another. Their validity must be determined by something outside of themselves. The reasoning on which the court proceeds is not altogether satisfactory. This doctrine, however, prevails in many jurisdictions; Underwood v. Waldron, 12 Mich. 73; George v. Harris, 4 N. H. 533; Society v. Perry, 6 N. H. 164; Troy Academy v. Nelson, 24 Vt. 189. Where it is made the legal duty of the plaintiffs to apply a fund to carrying out the charitable and benevolent purposes of an institution, this obligation furnishes consideration enough to uphold a note given as a donation; Trustees Orphan School v. Fleming, 10 Bush (Ky.) 234. doctrine certainly seems anomalous. See ante, p.

Gratuitous services. — Agreeably to the doctrine of the principal case, that a mere voluntary courtesy will not have a consideration to uphold an assumpsit, it is held that gratuitous services are no consideration for an implied promise to reward them. Where, therefore, one pays the debt of another, or performs some other service for him, no liability is thereby imposed on the latter without a precedent request from him: Hort v. Norton, 1 McCord 22; Frear v. Hardenbergh, 5 Johns. 272; Beach v. Vandenburgh, 10 Johns. 361. Nor can a promise

to pay be implied from services which, at the time they are performed, are regarded as being rendered for the mutual accommodation of the parties, for which neither one intends to make any charge against the other; Potter v. Carpenter, 76 N. Y. 157.

Promissory notes. — A promissory note is no exception to the rule that simple contracts, whether oral or written, must be founded upon a good consideration. While such note is in the hands of the payee, want of consideration is a good defence; Parish v. Stone, 14 Pick. 198; Delano v. Bartlett, 6 Cush. 364; Wilson v. Tucker, 64 Ind. 41. Therefore, a note given in renewal of a preëxisting note, which is without consideration, or a note given to procure the cancellation of a paid-up note and mortgage, is nudum pactum, for in neither case is there any surrender of a legal benefit which the payee might have retained; Hill v. Buckminster, 5 Pick. 391; Smith v. Boruff, 75 Ind. 412; Mason v. Jordan, 13 R. I. 193. But the surrender and cancellation of a valid existing note of the maker, or of a third person, is a good consideration for a note in renewal thereof: Mevers v. Van Wagoner, 56 Mo. 115; Wilton v. Eaton, 127 Mass. 174; Harrison v. McClelland, 57 Ga. 531. Such defence is likewise good between maker and indorsee without value given, Parish v. Stone, ubi sup.; and as between the maker and the assignee of the payee, Arnold v. Wilt, 86 Ind. 367. As to what, under peculiar circumstances, will be deemed a good consideration, see Wolford v. Powers, 85 Ind.

Benefit to a third person. — Where a benefit is done to a third person at the request of the promisor, it is sufficient to support his promise if it be contemporaneous with the original undertaking, and constitutes the inducement thereto. But a guaranty of a debt already contracted, or of a contract already made, must be supported by a new consideration; Conmey v. Macfarlane, 97 Penn. St. 361; Shaffer v. Ryan, 84 Ind. 140. In Conmey v. Macfarlane a note was given by the defendant to the plaintiff to secure part payment of a sum of money stolen by the defendant's son from the plaintiff. But as no evidence was offered of a release of the plaintiff's claim against the defendant's son, the note was held to be without sufficient consideration.

So a promise to pay money for an injury done by a third

person is without consideration unless a release of his right of action for damages is given by the payee; Ibid. Popple v. Day, 123 Mass. 520; Underwood v. Lovelace, 61 Ala. 155; Packard v. Richardson, 17 Mass. 121; Hendricks v. Robinson, 56 Miss. 694. Where a note at the time of its execution is signed or indorsed by the surety, his undertaking will be deemed a part of the original transaction and supported by the consideration moving to the principal. But if the undertaking of suretyship be entered into at a time subsequent to the execution by the principal, it is a distinct contract, and must be supported by a consideration of its own; Favorite v. Stidham, 84 Ind. 423; Beebe v. Moore, 3 McLean 387; Joslyn v. Collinson, 26 Ill. 61; Davidson v. King, 51 Ind. 224; Crossan v. May, 68 Id. 242. But the consideration must be known to the promisor, and the minds of the parties must meet and agree upon the terms of the whole contract; Ellis v. Clark, 110 Mass. 389. The signing of the defendant's name, without his authority, to a note as surety cannot be made valid by his subsequent ratification; Owsley v. Philips, 78 Ky. 517. The words "for value received" in a guaranty sufficiently express the consideration required by the statute of frauds; Dahlman v. Hammel, 45 Wisc. 466. A promise, however, is not necessarily implied in every request that a benefit be conferred upon a third person. as where a father having specially requested a physician to attend upon his daughter, who was of full age, married and for whom he was not bound to provide, though sick at his house, was deemed to have incurred no liability for the physician's services; Crane v. Badouine, 55 N. Y. 256.

Executed consideration. — The principal case declares that if a courtesy is moved by the suit or request of the party that gives the assumpsit it will bind. To the same effect are the American authorities, who consider it well settled that the past performance of services constitutes no consideration even for an express promise, unless they were performed at the express or implied request of the defendant, or unless they were done in performance of some duty or obligation resting on the defendant; Dearborn v. Bowman, 3 Met. 155; Green v. First Parish, 10 Pick. 500; McGilvery v. Capen, 7 Gray 525; Allen v. Woodward, 22 N. H. 544. The reason that a past consideration beneficial to the defendant must be laid to have been done upon request is that it is not reasonable that one man

should do another a kindness, and then charge him with a recompense. This would be obliging him whether he would or not, and bringing him under an obligation without his concurrence; Kent, J., in Livingston v. Rogers, 1 Caines 583. And it does not seem requisite in every case to aver an express request, for it may be inferred by the jury from the circumstances of the case; Comstock v. Smith, 7 Johns. 87; Wilson v. Edmonds, 24 N. H. 517, 546; Doty v. Wilson, 14 Johns. And while no assumpsit will be raised by the mere voluntary payment of the debt of another, yet if the plaintiff is compelled to pay the debt in consequence of the omission of the defendant so to do, or if, in order to save his property from being sold on legal process, he has been compelled to pay a debt which was really due from the defendant, the law will imply a request on the defendant's part, and a promise to repay, and the plaintiff has the same right of action as if he had paid the money at the defendant's express request; Nichols v. Bucknam, 117 Mass. 488. Where the mortgagor is in possession and neglects to pay taxes which are a lien on the land, the mortgagee may pay them, not only in reliance on the personal liability of the owner, but in reliance that the land is liable, and the lien will be deemed to be transferred by the State to him in favor of the mortgage debt; Hogg v. Longstreth, 97 Penn. St. 255.

Forbearance. — An agreement to forbear bringing suit for a debt due, even although for an indefinite time, and although it cannot be construed to be an agreement for perpetual forbearance, if followed by actual forbearance for a reasonable time, is a good consideration for a promise; Howe v. Taggart, 133 Mass. 284, and cases cited; Hall v. Clopton, 56 Miss. 555; Wills v. Ross, 77 Ind. 1. But it is necessary that the promisee should have a legal cause of action, for it is a very ancient rule of law that a promise to pay money in consideration of forbearance to sue, when there is no legal cause of action, is without consideration and void; Palfrey v. Portland, etc., Co., 4 Allen 55. Therefore, a promise made in consideration of forbearance to sue for damages for loss of life, where there is by law no ground for such action, is without consideration; Ibid. So also is a note given in consideration that a woman would forbear to sue the maker for seduction, inasmuch as the common law gives no right of action for such injury; Cline v. Temple-

ton, 78 Ky. 550; O. & C. R. R. v. Potter, 5 Oregon 228. But an agreement to forbear opposition to the probate of a will, or to involuntary bankruptcy proceedings begun against the promisee, though the opposition may be groundless, is yet sufficient to support a promise; Hill v. Buckminster, 5 Pick. 391; Sanford v. Huxford, 32 Mich. 313. Mere forbearance to sue, unless preceded by an agreement so to do, is insufficient; Mecorney v. Stanley, 8 Cush. 85; Manter v. Churchill, 127 Mass. 31; Cass County v. Oldham, 75 Mo. 50; Stovall v. Hairston, 55 Ga. 9. A promise to forbear and actual forbearance are sufficient to support a promissory note from a third person; Jennison v. Stafford, 1 Cush. 168; Robinson v. Gould, 11 Cush. 55. An agreement to forbear to sue upon a debt already due and payable, for no other consideration than the payment of part of the debt, cannot be availed of by the debtor either by way of contract or of estoppel; Warren v. Hodge, 121 Mass. 106; Conover v. Stillwell, 34 N. J. Law 54. See Turney v. Denham, 4 Bax. 569.

Compromise. — The compromise of a doubtful claim is a good consideration for a promise. Such an agreement is usually founded upon mutual concessions generally with advantage to each party. It is unlike an agreement to accept part of a debt in satisfaction of the whole where the consideration is clearly seen to be inadequate, for here, the consideration being indefinite, and the claim being doubtful, the parties have the right to fix their own price for its settlement, and the courts will not afterwards reopen the controversy; Kerr v. Lucas, 1 Allen 279; Barlow v. Ocean Ins. Co., 4 Met. 270; Clifton v. Litchfield, 106 Mass. 34; Boone v. Boone, 58 Miss. 820; Little v. Allen, 56 Tex. 133; Keefe v. Vogle, 36 Iowa 87; Allis v. Billings, 2 Cush. 19. The claim, however, must be shown to be valid, either at law or in equity, for if it is illegal and void it will not support a promise; Tucker v. Ronk, 43 Ia. 80. But the surrender of a note, whether at the time of its surrender it can be enforced or not, is sufficient to constitute a consideration for a new note; Wilton v. Eaton, 127 Mass. 174; Lawrence v. McCalmont, 2 How. 426, 452. So is the compromise of a contingent liability made before the happening of the event which would make it absolute; Honeyman v. Jarvis, 79 Ill. 318; the waiver of a tort though there be no real injury, if it is a benefit to the wrongdoer; Perkins v. Trinka, 30 Minn.

241; Miller v. Hawker, 66 Ill. 185; Parker v. Enslow, 102 Ill. 272; Hull v. Swartout, 29 Mich. 249.

Mutual releases. — If the parties to an executory contract mutually release each other from its performance, and subsequently enter into the same contract in form, it is the new contract which subsists between the parties supported by the consideration of mutual releases, and the old contract is as effectually discharged, released, and abrogated as if the new one had not been entered into; Dean v. Skiff, 128 Mass. 174. Accordingly, where the plaintiff made a written contract for the support and care of a lunatic, and later, finding it more onerous and expensive than he had anticipated, refused to continue his further care unless the defendant would make further compensation therefor, and thereupon the defendant agreed to make such further compensation, the original contract was deemed to be rescinded, and a new one, supported by a valid consideration, substituted therefor; Cutter v. Cochrane, 116 Mass. 408; Rollins v. Marsh, 128 Mass. 116; Snell v. Bray, 56 Wisc. 156; Galveston v. Galveston City R. R., 46 Tex. 435; Rumberger v. Golden, ubi sup.; McNish v. Reynolds, 95 Penn. St. 483; B. & M. R. R. Co. v. Penney, 38 Iowa 255.

Extension of time. — An agreement to extend the time for the payment of a debt or performance of a contract must be supported by a sufficient consideration; Wilson v. Powers, 130 Mass. 127; Jennings v. Chase, 10 Allen 526, and cases cited; Hume v. Mazelin, 84 Ind. 574. If, however, an agreement for an extension of time for the payment of a note is made between the holder and the maker without the assent of the surety or indorser, it will operate to discharge the latter. But he will not be discharged if the agreement is not founded upon a valuable consideration, or if he consents to the extension; Carraway v. Odeneal, 56 Miss. 223. See Lathrop v. Page, 129 Mass. 19.

Privity of contract. — In the cases which we have so far considered, the consideration has moved directly between the contracting parties. We come now to a class of cases in which the consideration moves from a third person. The question whether privity of contract between the plaintiff and the defendant is necessary to the maintenance of an action has been much debated in the courts of this country, and the decisions are by no means reconcilable. Learned tribunals, after mature

deliberation, have reached opposite conclusions. By the courts of Massachusetts, and perhaps a few other States, such privity is deemed essential, but by a preponderance of American authority it is not.

In Massachusetts, where the question may now be considered at rest, the general rule is that "a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another for the benefit of a third person who is a stranger to the consideration will not support an action by the latter. And the recent decisions in this commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it;" Gray, J., in Exchange Bank v. Rice, 107 Mass. 37; Carr v. Security Bank, 107 Mass. 45; Morrill v. Lane, 136 Mass. 93; Gamwell v. Pomeroy, 121 Mass. 207; Rogers v. Union Stone Co., 130 Mass. 581. The Massachusetts cases which form exceptions to this rule may be divided into three classes: 1st. Those in which money had and received can be maintained although there is no privity of contract between the plaintiff and the defendant, nor any direct consideration moving from one to the other, by showing that the defendant has, in his hands, money which, in equity and good conscience, belongs to the plaintiff. To this class belong Arnold v. Lyman, 17 Mass. 400; Hall v. Marston, Id. 574; Felch v. Taylor, 13 Pick. 133; Carnegie v. Morrison, 2 Met. 381; Cabot v. Haskins, 3 Pick. 83; Frost v. Gage, 1 Allen 262. 2d. Where a promise has been made to a father or uncle for the benefit of a child or nephew. To this class belongs Felton v. Dickinson, 10 Mass. 287. 3d. Where the defendant agrees in writing with the lessee to take his lease and pay the lessor rent, and, having entered into possession with the knowledge of the lessor, and paid him rent for a year, leaves the premises. Here it is held that an action can be maintained against him by the lessor; Brewer v. Dyer, 7 Cush. 337.

But the unguarded expressions of Chief Justice Shaw in Carnegie v. Morrison, supra, and Mr. Justice Bigelow in Brewer v. Dyer, supra, contrary to the general rule just stated have been qualified and limited by subsequent decisions. Exchange Bank v. Rice, supra; Mellen v. Whipple, 1 Gray 317; Millard v. Baldwin, 3 Gray 484; Field v. Crawford, 6 Gray 116; Dow v. Clark, 7 Gray 198; Colburn v. Phillips, 13 Gray 64; Flint v.

Pierce, 99 Mass. 68. Where, however, the promisee is, in fact, acting as the agent of a third person, although that is unknown to the promisor, the principal is the real party to the contract, and may therefore sue in his own name on the promise made to his agent; Huntington v. Knox, 7 Cush. 371; Barry v. Page, 10 Gray 398; Hunter v. Giddings, 97 Mass. 41; Ford v. Williams, 21 How. 287; Crowell v. Currier, 12 C. E. Green 152; Hinkley v. Fowler, 15 Me. 285; Delaware Canal v. Westchester, etc., 4 Denio 97.

But there has been a conflict of opinion not only between courts of different States, but between courts of the same State at different times. In New York there has been a "singular oscillation of opinion, the courts apparently swaving to and fro under the pressure of sympathy with hardship at one time, or at another of loyalty to the principle that to a contract two consenting minds are essential." The first prominent case bearing on the subject is Lawrence v. Fox, 20 N. Y. 268, decided in 1859. There one Holly, at the request of the defendant, loaned to him \$300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him on the next day; that the defendant, at the time of receiving the money, in consideration thereof promised to pay it to the plaintiff the then next day. On action brought, judgment was rendered for the plaintiff, and the Court of Appeals, though divided, affirmed this judgment, Grav, J., in his opinion stating that "the adjudications in this State, from a very early period, approved by experience, have established the defendant's liability." The court refers to Farley v. Cleaveland, 4 Cow. 432, on error, 9 Id. 639, as a sound authority, never doubted by the courts of that State; and to Seaman v. Whitney, 24 Wend, 260. In the former case one Moon owed Farley and sold to Cleaveland a quantity of hay in consideration of which Cleaveland promised to pay Moon's debt to Farley. Held that the hay received by Cleaveland from Moon was a valid consideration for his promise to pay Farley, and the action was sustained. The report of this case shows that a promise was made not only to Moon, but an express promise also was made to Cleaveland. But in Seaman v. Whitney, supra, it was decided that an undertaking to pay the creditor may be implied from an arrangement to that effect between the defendant and the debtor. Barker v. Bucklin, 2 Denio 45;

Delaware Canal v. Westchester Bank, 4 Id. 97; Schermerhorn v. Vanderheyden, 1 Johns. 139; Dumond v. Carpenter, 3 Johns. 183; Weston v. Barker, 12 Johns. 276; Coster v. The Mayor of Albany, 43 N. Y. 399. Following Lawrence v. Fox, and the decisions there relied on, it was held in Burr v. Beers, 24 N. Y. 178, that where the assignee of an equity of redemption assumed the mortgage an action against him by the mortgagee in his own name would lie. Prentice v. Brimhall, 123 Mass. 291, contra. But the doctrine as laid down in Lawrence v. Fox, and Burr v. Beers, has been qualified by subsequent decisions. Garnsey v. Rogers, 47 N. Y. 233, decided that where a mortgagee agrees in his mortgage to pay a prior mortgage upon the same premises such agreement cannot be enforced against him by the holder of the prior mortgage. And where the grantee in a deed agrees to pay a mortgage or debt for which the grantor is not liable, the holder of the mortgage or debt cannot enforce such agreement against the grantee; Vrooman v. Turner, 69 N. Y. 280. Nor is the grantee liable if, having covenanted to assume the mortgage, he is evicted by a paramount title; Dunning v. Leavitt, 85 N. Y. 30; Crowe v. Lewin, 95 N. Y. 423. On a bond given by one of two partners to the other on a dissolution of the firm conditioned to pay the debts of the firm, a creditor of said firm cannot maintain an action as on a promise for his benefit; Merrill v. Green, 55 N. Y. 270; Barlow v. Myers, 64 N. Y. 41; Arnold v. Nichols, Id. 117; Simson v. Brown, 68 N. Y. 355; Wheat v. Rice, 97 N. Y. 296; contra, Claffin v. Ostrom, 54 N. Y. 581. Where the plaintiff has an exclusive interest in the subject-matter of the promise, see Sailly v. Cleveland, 10 Wend. 156. The general doctrine is still further limited by the case of The Lake Ontario, etc., R. R. v. Curtiss, 80 N. Y. 219, where Danforth, J., says, "The general rule is that when two persons for a consideration sufficient as between themselves covenant to do some act, which, if done, would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant." But in a late case, Knowles v. Erwin, 43 Hun 150, 26 Wkly. Dig. 37, on the authority of Dutton v. Poole, it was held that where a parent conveyed land to his son, and the latter, in consideration thereof, agreed to pay his sister a certain sum of money, she could maintain an action to recover the same. The Rogers L. Works v. Kelly, 88 N. Y. 234.

But while the New York decisions early and late cannot be reconciled, it is yet evident that there is a tendency to limit more strictly the exceptions to the general rule that the person must sue to whom the promise is made. The judges yielded assent to the doctrine of Lawrence v. Fox with reluctance, and they are disinclined to extend it to new or doubtful cases; Ætna Natl. Bk. v. Fourth Natl. Bk., 46 N. Y. 82; Pardee v. Treat, 82 N. Y. 385.

In Blymire v. Boistle, 6 Watts 182, which is a leading case on the subject in Pennsylvania, A., the plaintiff, had a judgment against B. In a conversation between B. and C., the defendant, it was agreed, in consideration that B. would convey a lot of land to C., C. would pay to A. the judgment which B. owed him. It was held, on the authorities, that the action could not be maintained, the plaintiff being a stranger to the consideration. The rule was there said to be that "if one pay money to another for the use of a third person, or, having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested. But where the contract is for the benefit of the contracting party, and the third person is a stranger to the contract and consideration, the action must be by the promisee." And the decision is supported by reasons of substantial justice, for when, as in this case, a debt already exists from one person to another, a promise by a third person to pay such debt being for the benefit of the original debtor, to relieve him from the payment of it, he ought to have a right of action against the promisor for his own indemnity, and if the promisor were also liable to the original creditor he would be subject to two separate actions at the same time for the same debt, besides being deprived of any defence or set-off which might subsequently arise against the intermediate debtor. Morrison v. Berkey, 6 Watts 349, affirming Blymire v. Boistle, supra; Hubbert v. Borden, 6 Whart, 79, 94; Edmundson v. Penny, 1 Penn. St. 334; Ramsdale v. Horton, 3 Penn. St. 330; Owings v. Owings, 1 Harr. & G. 484; Guthrie v. Kerr, 85 Penn. St. 303; Wynn v. Wood, 97 Penn. St. 216; Nat. Bk. v. Grand Lodge, 98 U. S. 123. A fortiori, where a covenant is made by one for the benefit of another, the action must be brought in the name of the person with whom the covenant is made, and not in the name of the person benefited thereby; Strohecker v. Grant, 16 S. & R. 237; San-

ders v. Filley, 12 Pick. 554; Johnson v. Foster, 12 Met. 167; Flynn v. N. Am. Ins. Co., 115 Mass. 449; Northampton v. Elwell, 4 Gray 81; Hinkley v. Fowler, 15 Me. 285. In these cases the privity of contact, which is indispensable to the maintenance of the action in the name of the original creditor, is wanting, and in this consists the distinction between them and Esling v. Zantzinger, 13 Penn. St. 50, where, there being an express promise by the debtor to a third person to pay him, the action was sustained. Uhland v. Uhland, 17 S. & R. 265; Huckabee v. May, 14 Ala. 263; Comfort v. Eisenbeis, 11 Penn. St. 1. In accordance with the principle of Blymire v. Boistle is Hind v. Holdship, 2 Watts 104, where P. & L., manufacturers, having failed, made an assignment of their property to Holdship, who promised P. to pay the workmen, and Hind, one of the workmen, having brought his action it was sustained. Beers v. Robinson, 9 Penn. St. 229; Vincent v. Watson, 6 Harris 96. Torrens v. Campbell, 74 Penn. St. 470, it seems, followed Blymire v. Boistle and Hind v. Holdship, but rejected plaintiff's claim on the ground that it did not appear upon the schedule of debts which the defendant agreed to pay. But in Merriman v. Moore, 90 Penn. St. 78, Paxson, J., declared it to be "a rudimental principle that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself," citing Townsend v. Long, 77 Penn. St. 143; Justice v. Tallman, 86 Penn. St. 147. See Kountz v. Holthouse, 85 Penn. St. 235.

In Hendrick v. Lindsay, 93 U. S. 143, Mr. Justice Davis says: "the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country." But in a later case, National Bank v. Grand Lodge, 98 U. S. 123, the scope of the above doctrine was somewhat restricted by Mr. Justice Strong, who declares the general rule to be that such privity must exist, though, confessedly, with many exceptions. Austin v. Seligman, 18 Fed. Rep. 519, and Dr. Wharton's valuable note appended.

As adhering to the English rule may be cited Hall v. Huntoon, 17 Vt. 244, in which Chief Justice Williams says: "The legal interest in a contract is in the person to whom the promise is made, and from whom the consideration passes; and,

consequently, he is the person who must bring the action; and if there are any cases which seem to be at variance with this, they are to be considered as exceptions to the general rule." Crampton v. Ballard, 10 Vt. 251; Pangborn v. Saxton, 11 Vt. 79; Warren v. Batchelder, 15 N. H. 129; Ross v. Milne, 12 Leigh 204.

In Treat v. Stanton, 14 Conn. 445, the court say: "It is very plain that the courts have not intended to relax, in any degree, the rule that a legal interest is requisite in the plaintiff. They only invest the party who is solely benefited by the promise with that legal interest, and thus consider him as the real party to the contract."

In support of the view now generally held in the courts of this country, that one may bring suit on a simple contract when it contains a provision for his benefit, though he be not a party to it, is Joslin v. New Jersey Car Spring Co., 7 Vroom 141, where it is said, "If one person makes a promise to another, for the benefit of a third, the third may maintain an action on it, though the consideration does not move from him." Also Kollock v. Parcher, 52 Wis. 393, where it is said, "Under the repeated decisions of this court, the persons for whose benefit the promise is made may maintain action in their own names to enforce such promise," and cases in support thereof are cited. "It has been many times decided that a promise made by one to another, from whom the consideration moves, for the benefit of a third, may be sued on by the party for whose benefit the promise was made." Elliott, J., in Clodfelter v. Hulett, 72 Ind. 137, and cases cited. "It is well established in this State that a party for whose benefit a stipulation in a simple contract is made may maintain a suit on such stipulation in his own name;" Fitzgerald v. Barker, 70 Mo. 685, and cases cited; Snell v. Ives, 85 Ill. 279.

CHANDELOR v. LOPUS.

PASCHÆ. -1 JACOBI 1.

[REPORTED 2 CROKE, 2.]

The defendant sold to the plaintiff a stone, which he affirmed to be a Bezoar stone, but which proved not to be so. No action lies against him, unless he either knew that it was not a Bezoar stone, or warranted it to be a Bezoar stone.

Action upon the case: whereas the defendant being a gold-smith, and having skill in jewels and precious stones, had a stone, which he affirmed to Lopus to be a Bezoar stone, and sold it to him for a hundred pounds; ubi reverâ, it was not a Bezoar stone.

The defendant pleaded, Not guilty.

After verdict, and judgment for the plaintiff in the King's Bench, error was therefore brought in the Exchequer Chamber; because the declaration contains not matter sufficient to charge the defendant, viz. that he warranted it to be a Bezoar stone or that he knew that it was not a Bezoar stone; for it may be that he himself was ignorant whether it were a Bezoar stone or not.

And all the Justices and Barons (besides Anderson) held, that for this cause it was error. For the bare affirmation that it was a Bezoar stone, without warranting it to be so, is no cause of action. And although he knew it to be no Bezoar stone, it is not material (a). For every one, in selling of his wares, will affirm that his wares are good, or the horse that he sells is

⁽a) This proposition, which was not the argument for necessary to the decision, has often in this very cobeen denied. See the notes, post: and trary.

sound: yet if he warrants them not to be so, it is no cause of action. And the warranty ought to be made at the same time as the sale (a). Fitz. Nat. Brev. 94, c. & 98 b.; 5 H. 7. 41; 9 H. 6. 53; 12 H. 4. 1; 42 Ass. g. 7; 7 H. 4. 15. Wherefore, forasmuch as no warranty is alleged, they held the declaration to be ill. But Anderson to the contrary; for the deceit in selling it for a Bezoar, whereas it was not so, is cause of action. But notwithstanding it was adjudged to be no cause, and judgment was reversed.

Ir the plaintiff in this case were to claim upon a warranty of the stone, he would at the present day perhaps succeed, the rule of law being that every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended. See Power v. Barham, 4 A. & E. 473; Shepherd v. Kain, 5 B. & A. 240; Freeman v. Baker, 2 N. & M. 446 [Hopkins v. Tanqueray, 15 C. B. 130; Carter v. Crick, 4 H. & N. 412; and Stuckley v. Baily, 1 H. & C. 405; S. C., 31 L. J. Exch. 483]. Even where there is a written memorandum relating to the subject-matter of the representation; Allen v. Pink, 4 M. & W. 140. See Wright v. Crookes, Scott, N. R. 685; Jeffrey v. Walton, 1 Stark. 267; provided it do not purport to be a complete contract: Harnor v. Groves, 15 C. B. 667. (See Taylor v. Bullen, 5 Exch. 779, as to a sale with all faults.) If not, he would at all events succeed, if he were to sue in tort, laying a scienter, since the fact of the defendant's being a jeweller would be almost irresistible evidence that he knew his representation to be false.

When Chandelor v. Lopus was decided, as the action of assumpsit was by no means so distinguishable from case, ordinarily so called, as at present; so the distinction was not then clearly recognized, which is now, however, perfectly established, between an action upon a warranty express or implied, which is founded on the defendant's promise that the thing shall be as warranted, and in order to maintain which it is unnecessary that he should be at all aware of the fallacious nature of his undertaking, and the action upon the case for false representation, in order to maintain which the defendant must be shown to have been actually and fraudulently cognizant of the falsehood of his representation for to have made the representation fraudulently without belief that it was true; Taylor v. Ashton, 11 M. & W. 415]; actions of the former description being then usually framed in tort, under the name of actions for deceit. See Williamson v. Allison, 2 East 446; Shrewsbury v. Blount, 2 M. & G. 475, 2 Scott, N. R. 588, S. C.; the observations of Grose, J., in Pasley v. Freeman, 3 T. R. 54, and of Tindal, C. J., in Budd v. Fairmaner, 8 Bing. 48 [Behn v. Kemble, 7 C. B. N. S. 260]; Steuart v. Wilkins, Dougl. 18, is said by Lawrence, J., in 2 East 451, to have been the first case where the question was regularly discussed, and the mode of declaring in assumpsit established. However, the main doctrine laid down in Chandelor v. Lopus has never since been disputed, viz. that the plaintiff must either declare upon a contract, or, if he declare in tort for a misrepre-

⁽a) For, if made afterwards, there is no consideration for it. Finch, L. 189; 3 Bl. Comm. 166.

sentation, must aver a scienter. That such an action is maintainable when the scienter can be proved, though there be no warranty, is now (notwithstanding the dictum in the text) well established. Dunlop v. Waugh, Peake 23; Jendwine v. Slade, 2 Esp. 572; Dobell v. Stevens, 3 B. & C. 625; Fletcher v. Bowsher, 2 Star. 561.

It is sometimes not very easy to determine whether an action of assumpsit upon a warranty should be brought against the vendor of a chattel, or whether the proper remedy be by action upon the case for misrepresentation. We have already observed, that every affirmation respecting the chattel, made, at the time of sale, by its vendor, is a warranty if so intended. But it is sometimes far from easy to decide whether a particular assertion was, or was not, intended for a warranty; and, if it turn out to have been meant merely for a representation, the plaintiff suing on it must aver a scienter, and must not treat it as a warranty, but will be defeated unless it turn out to have been false within the knowledge of the party making it. Such was the case of Budd v. Fairmaner, 8 Bing. 48, where the plaintiff, in order to prove the warranty, put in the following instrument, signed by the defendant: "Received of Mr. Budd, 10l. for a gray four-year-old colt, warranted sound in every respect." It was held at Nisi Prius, and afterwards by the court in banc, that the warranty applied only to the soundness, and that the age was mere matter of description, and the plaintiff, who had sued as upon a warranty of the age, was nonsuited. And see Allan v. Lake, 18 Q. B. 560.

With respect to actions upon the case for a false representation, although the declaration always imputed to the defendant fraud, and an intent to deceive the plaintiff; and although it is expressly laid down that "fraud and falsehood must concur to sustain this action," per Gibbs, C. J., Ashlin v. White, Holt, 387; still, in order to prove such fraud as the law considers sufficient to sustain the action, it is only necessary to show that what the defendant asserted was false within his own knowledge, or asserted [either] recklessly without any knowledge upon the subject, per Maule, J., Evans v. Edmunds, 13 C. B. 777 [per Lord Cairns, Reese River Silver Mining Co. v. Smith, L. R. 4 H. L. 79; Redgrave v. Hurd, 20 Ch. D. 1; 51 L. J. Ch. 113; Hart v. Swaine, per Fry, J., 7 Ch. D. 42, 47 L. J. Ch. 5; Eaglesfield v. Lord Londonderry, 4 Ch. D. C. A. 693] (see Pulsford v. Richards, 17 Beav. 87), [or without belief that it was true, Taylor v. Ashton, 11 M. & W. 415, where in the seventh line from the bottom of the page, "true" should be corrected to "untrue", and with an intention to induce another to act on the faith of it, and alter his position to his damage. Thom v. Bigland, 8 Exch. 725 (where the report of the judgment of Parke, B., at page 731, fourth line from bottom, should be corrected by changing "or" into "and," and striking out the word "fraudulent" [see 9 Exch. 426, n. (a)]), and that it occasioned damage to the plaintiff; Foster v. Charles, 6 Bing. 396, 7 Bing. 105; Corbet v. Brown, 8 Bing. 133 [Collins v. Cave, 4 H. & N. 225, in error, 6 H. & N. 131; Eastwood v. Bain, 28 L. J. Exch. 74; Smith v. Chadwick, 9 App. Cas. 187; 53 L. J. Ch. 873]. For which purpose it must appear that the plaintiff relied upon it. See Atwood v. Small, 6 Cl. & F. 232; Vigers v. Pike, 8 Cl. & F. 562; Shrewsbury v. Blount, 2 Scott, N. R. 588, 2 M. & Gr. 475 [see Kennedy v. Panama, &c., Mail Co., L. R. 2 Q. B. 580, 36 L. J. Q. B. 260]; though it should seem, that the fact of a misrepresentation having been made, and a course pursued into which that misrepresentation was calculated to mislead, is primâ facie evidence that the plaintiff was misled by it; Watson v. Earl of Charlemont, 12 Q. B. 856. [It need not be in terms expressly stating the existence of some untrue fact, see the judgment of Crompton, J., Lee v. Jones, 34 L. J. C. P. 131, in Cam. Scace

For the distinction between the Common Law action for deceit and the rules of equity applicable to the rescission of contracts on the ground of misrepresentation, see Redgrave v. Hurd, 20 Ch. D. 1; 51 L. J. Ch. 113; Smith v. Land, &c., Corporation, 28 Ch. D. 7; Reese River Co. v. Smith, L. R. 4 H. L. 79; Lamare v. Dixon, L. R. 6 H. L. 414. It is not necessary in such cases to show that the person making a material misrepresentation upon which another has acted knew it to be false, it is sufficient if it be false in fact. Nor is it a defence to such a claim that the party seeking to rescind was careless in availing himself of means of knowledge which might have shown him, had he been more diligent, that the representation was untrue. Redgrave v. Hurd, ubi sup.

The averment that a misrepresentation was made to the plaintiff may be proved without showing that the statement complained of was addressed to the plaintiff individually; for a statement to the public at large is in effect a statement to every individual whom it reaches; see the judgment in Gerhard v. Bates, 2 E. & B. 476; McKune v. Johnson, 5 C. B. N. S. 218; The New Brunswick, &c., Railway Co. v. Conybeare, 9 H. of L. C. 711; 31 L. J. Cha. 297; Kisch v. Central Railway Co., &c., 34 L. J. Cha. 545; L. R. 2 H. L. 99; and Scott v. Dixon, 29 L. J. Exch. 62, note (3), where the director of a banking company was held liable to a person who was not a shareholder in the company for having made a misrepresentation in a report which was only addressed to the shareholders, but intended for the information of all who were likely to have dealings with the bank. In Denton v. The Great Northern Railway Co., 5 E. & B. 860, the fraudulent representation was the advertisement in a time table, published and kept in circulation by the defendants, of a train which had ceased to run.

In Bayshaw v. Seymour, 18 C. B. 903, affirmed, but without argument, in Dom. Proc., June, 1858, see 29 L. J. Ex. 64, and Bedford v. Bagshaw, 4 H. & N. 538, an action against the same defendant decided on the authority of the former cases, an action of deceit was held to lie in respect of a misrepresentation which had not been made to the plaintiff. In that case the plaintiff had been induced to purchase shares by seeing them quoted in the official list of the committee of the Stock Exchange, and the shares would not have been so quoted but for fraudulent misrepresentations made by the defendant to the committee, with intent to induce the public to purchase the shares, in the belief that their insertion in the list had been honestly procured. In Peek v. Gurney, however, L. R. 6 H. L. 377; 43 L. J. Ch. 19, it was pointed out by Lord Chelmsford that these cases could not be looked upon as binding authorities. There the directors of a company had issued a prospectus containing false representations, and it was held that the plaintiff, who was not an original allottee, but had bought shares in the market, had failed to connect himself sufficiently with the representations of the prospectus to enable him to maintain an action against the directors. In Swift v. Winterbotham, L. R. 8 Q. B. 244; 9 Q. B. 301, 42 L. J. Q. B. 111, 43 L. J. Q. B. 56; the representation, which was held to be actionable. was made by the manager of a bank to the manager of another bank, who had made inquiries at the instance of the plaintiff, a customer.]

In Polhill v. Walter, 3 B. & Ad. 114, the defendant, who had formerly been in partnership with Hancorne, and still carried on business in the same house, accepted, as per procuration of Hancorne, a bill drawn on the latter. The bill was afterwards indorsed to the plaintiff, who gave value for it, and having been dishonored by Hancorne, the plaintiff sued the defendant for "falsely and fraudulently pretending to accept the same by procuration of Hancorne." At the trial, the jury being directed by Lord Tenterden to find for the defendant if they thought there was no fraud, otherwise for the plaintiff, found a verdict for the

defendant: his lordship giving the plaintiff leave to move to enter a verdict; which motion was accordingly made, and the rule to enter the verdict for the plaintiff ultimately made absolute.

"If," said Lord Tenterden, delivering the judgment of the court, "the defendant when he wrote the acceptance, and thereby in substance represented that he had authority from the drawer to make it, knew that he had no such authority (and upon the evidence there can be no doubt he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence." See Pontifex v. Bignold, 3 Scott, N. R. 390, 3 M. & Gr. 63, S. C. [and Owen v. Van Uster, 20 L. J. C. P. 61, where semble that an action similar to that in Polhill v. Walter might have been maintained against the defendant (see per Maule, J.), but being himself one of the persons to whom the bill was addressed, and on whose behalf he purported to accept it, he was held personally liable as acceptor.

Connected with this subject are those cases where it has been sought to fix with liability an agent who $bon\hat{a}$ fide believing himself to have authority, but without in fact having it, has made a contract on behalf of a principal.

In Randell v. Trimen, 18 C. B. 786, the declaration alleged that the defendant falsely and fraudulently represented to the plaintiffs that he was authorized to order stone of them for A., upon which representation the plaintiffs acted, and supplied the stone, and A. refused to pay for it; and that the plaintiffs having sued A. had failed, and had been obliged to pay his costs: the judge who tried the case at Nisi Prius told the jury that if the defendant had made the representation, and it was untrue, the plaintiffs were entitled to recover from him the price of the stone and the costs of the action against A. The jury found for the plaintiffs, and upon the argument of a rule for a new trial, Jervis, C.J., expressed an opinion that the defendant was liable, even supposing he believed the representation to be true; but the learned judge must not be taken to have meant that in such case the defendant was liable to the kind of action which had been brought against him. See Oxenham v. Smythe, 6 H. & N. 690; 31 L. J. Exch. 110. Formerly, it seems to have been assumed that the remedy against a person contracting on behalf of another without authority was either by action on the case for the false representation, or by action against him as principal on the original contract; and, therefore, when Jenkins v. Hutchinson, 13 Q. B. 744, and Lewis v. Nicholson, 18 Q. B. 503, established the rule that a person contracting without authority as agent for a named principal is not liable on the contract as principal (unless, indeed, there be no principal in existence, in which case ut res magis valeat quam pereat he is personally liable as principal, Kelner v. Baxter, L. R. 2 C. P. 174, 36 L. J. C. P. 94), it was an open question whether the professed agent was liable at all, since if he entered into the contract under the honest belief that he was possessed of authority to bind the supposed principal, he could not be liable to an action for a fraudulent representation. It was, however, suggested by the court in Lewis v. Nicholson (and a remark previously made by Erle, J., in Jenkins v. Hutchinson, would lead to the same conclusion), that in these cases the facts would support an action upon a warranty by the defendant that he had the authority which he assumed to have. Not long afterwards such an action was brought, and held to lie.

In Collen v. Wright, 7 E. & B. 301; 26 L. J. Q. B. 147, the defendant's testator had, as agent for one Gardner, signed an agreement with the plaintiff to let him some land belonging to Gardner upon certain terms. The testator, in fact, had not (though he believed that he had) authority to let the land on those particular terms. The plaintiff took possession of the land, laid out money upon it, and, on Gardner's repudiating the agreement, filed a bill for specific perform-

ance against him, which bill was dismissed. Upon these facts the court held, in accordance with their previous suggestion, that the testator had warranted that he was authorized to enter into the agreement, and that for the breach of that warranty he was liable to pay damages, including the amount of the costs incurred by the plaintiff in the Chancery suit. And see as to damages *Pow v. Dacis*, 1 B. & S. 220; 30 L. J. Q. B. 257; *Spedding v. Nevell*, L. R. 4 C. P. 212, 38 L. J. C. P. 133; *Godwin v. Francis*, L. R. 5 C. P. 295, 39 L. J. C. P. 121; *Richardson v. Williamson*, per Blackburn, J., L. R. 6 Q. B. 276.

Collen v. Wright was a special case stated without pleadings; it was followed by Simons v. Patchett, 7 E. & B. 568; 26 L. J. Q. B. 195, in which case appears the first reported precedent of a declaration on such a warranty, or promise of authority. In that case, the first count alleged that in consideration that the plaintiff would make a contract with the defendant as and assuming to be agent for a certain firm, the defendant promised the plaintiff that he was authorized by that firm to make the contract as agent for them, that the contract was so made, and that the defendant had not authority to make it. The second count was upon a like promise, that the defendant had authority from the firm as agent for them to request the plaintiff to do work and provide materials for them. The defendant pleaded non assumpsit and a denial of the breaches of promise. It appeared at the trial that he made the contract as agent for the firm, and in so doing exceeded his authority; and upon these facts his liability, according to Collen v. Wright, was not questioned. Afterwards Collen v. Wright was affirmed by the Exchequer Chamber (8 E. & B. 647), Cockburn, C. J., differing from the rest of the court. The nature of the obligation of the professed agent in such cases was said by Willes, J., in delivering the judgment of the majority of the judges, in the court of error, "to be well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to, or promises the person who enters into such contract upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent as such is a good consideration for the promise." See also the judgments of Willes, J., and Bramwell, B., in Warlow v. Harrison, 1 E. & E. 309, 29 L. J. Q. B. 14 (as to which latter case, however, see Harris v. Nickerson, L. R. 8 Q. B. 286); Cherry v. Colonial Bank of Australasia, L. R. 3 P. C. 24, 38 L. J. P. C. 49; Richardson v. Williamson, L. R. 6 Q. B. 276, 40 L. J. Q. B. 145; Weeks v. Propert, L. R. 8 C. P. 427, 42 L. J. C. P. 129 Dickson v. Reuter's Telegraph Co., 2 C. P. D. 62: Chapleo v. Brunswick Building Society, 6 Q. B. D. 696; 50 L. J. Q. B. 372.

For an application of the same principle to another class of cases, see Worthington v. Sudlow, 2 B. & S. 508; 31 L. J. Q. B. 131.

The agent is not responsible for a mistaken representation of law, Beattie v. Lord Ebury, L. R. 7 Ch. 777, 41 L. J. Ch. 805; affirmed L. R. 7 H. L. 102, but on the ground that there had been no misrepresentation, and see Euglesfield v. Marquis of Londonderry, 4 Ch. D. 693; 26 W. R. 540 H. L., and the remarks of Bowen, L. J., in West London Commercial Bank v. Kitson, 13 Q. B. D. 360; 53 L. J. Q. B. 345.] The modern cases upon the subject of fraudulent misrepresentations are collected in the note to Pasley v. Freeman, post, vol. ii.

The first instance in which an action of *tort* for a misrepresentation respecting the ability of a third person was solemnly adjudged to be maintainable, is the case of *Pasley v. Freeman*, 3 T. R. 53, decided by Lord Kenyon, C. J., Ashurst, J., and Buller, J., against the opinion of Grose, J., A.D. 1789. See the case at large, *post*, vol. ii. It came before the court on motion in arrest of judgment, on a declaration, stating, "that the defendant, intending to deceive

and defraud the plaintiffs, did wrongfully and deceitfully encourage and persuade them to deliver certain goods to Falch on credit, and for that purpose did falsely, deceitfully, and fraudulently assert that Falch was a person safely to be trusted, whereas, in truth, Falch was not a person safely to be trusted, and the defendant well knew the same." One of the consequences of its introduction was to qualify considerably the effect of that enactment of the Statute of Frauds, which requires that guarantees should be in writing: since it frequently happened, that where one person had interested himself to procure credit for another, in a manner which would have been insisted upon as amounting to a guaranty but for the enactment of the Statute of Frauds, the expressions used by him in his endeavors to effect his purpose were relied on as representations respecting his friend's credit or character, and he was accordingly sued in the form of which Pasley v. Freeman has established the legitimacy. It was in order to prevent the Statute of Frauds from being thus trenched upon, that the legislature, in 9 Geo. 4, c. 14, commonly called Lord Tenterden's Act, enacted, sec. 6, "that no action shall be maintained whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

This section of the act was elaborately discussed in the great case of Lyde v. Barnard, 1 M. & W. 101. It was an action on the case for falsely representing, in answer to inquiries on that subject, that the life-interest of Lord Edward Thynne in certain trust-funds was charged only with three annuities, whereby the plaintiff was induced to advance to the said Lord E. T. 909l. for the purchase of an annuity, secured by his covenant, bond, warrant of attorney, and an assignment of his life-interest in the said funds; whereas the defendant well knew that the said interest was charged not only with three annuities, but with a mortgage for 20,000l. At the trial, it appeared that the false representation was made by parol, on which the Lord Chief Baron nonsuited the plaintiff, conceiving the case to fall within the 9 Geo. 4, c. 14, s. 6. On the motion for a new trial, the court was equally divided, and the learned barons delivered elaborate opinions seriatim.

Lord Abinger and Gurney, B., thought the case within the statute, conceiving the true construction to be, that the representation or assurance thereby required to be in writing should concern or relate to the *ability* of the third person effectually to perform and satisfy an engagement of a pecuniary nature, into which he has proposed to enter, and on the faith of which he was to obtain money, credit, or goods; and conceiving that the representation in this case did concern the *ability* of Lord E. T. to perform an engagement of a pecuniary nature, on the faith of which he was to obtain money, since it concerned his ability to give the plaintiff a sufficient security to repay him, by way of a life annuity, the money he was about to advance.

On the other hand, Parke and Alderson, Barons, conceived that the representation in question did not appear to relate to "the character, conduct, credit, ability, trade, or dealings" of Lord Edward Thynne; and therefore, did not fall within the statute. "It does not," it was urged, "concern or relate to his character, or to his credit; it does not relate to his conduct, trade, or dealings, for it is totally immaterial with reference to the inquiry and the answer to it, who had incumbered the fund: the only question in substance being, to what extent it was incumbered. And it does not concern or relate to his ability; for that word, especially when we look at those which accompany it, means, in its

ordinary sense, some quality belonging to the third party, and not to the thing to be transferred. . . . If it was doubtful whether the present representation was meant to relate to the state of the fund only, or to the state of the fund as an element of Lord Edward Thynne's personal credit, that question ought to have been submitted to the jury."

The court being equally divided, the rule would have been discharged, but, the question being of great importance, a new trial was granted on payment of costs, in order that it might be raised upon the record. I am not, however, aware that it was so. The point was again raised, but not decided, in *Townley* v. *Macgregor*, 6 Scott, N. R. 906, 6 M. & G. 46, the plea which denied that the representation was in writing having been held at all events ill for argumentativeness. The opinion of Lord Abinger and Gurney, B., appears, however, to be reinforced by that of the Q. B. in *Swann* v. *Phillips*, 8 A. & E. 457.

In a subsequent case, the court of Queen's Bench held that though the action be for money had and received to recover cash obtained from the plaintiff by means of the misrepresentation, still if the misrepresentation constitute the whole of the plaintiff's case, parol evidence of it cannot be received. Haslock v. Fergusson, 7 A. & E. 6. Whether in a case depending partly but not wholly on such a misrepresentation parol evidence would be admissible [had not, when the fourth edition of this work was composed, been decided; but since that time, in a case where the plaintiff had been induced to incur the damage complained of partly by the written representation and partly by oral representations of the defendant, a ruling that the plaintiff was entitled to the verdict, if she was substantially and mainly influenced by the written representation, was upheld by the court of error upon a bill of exceptions. See Tatton v. Wade, 18 C. B. 371. The act applies to a misrepresentation by one partner respecting the credit of the firm. Devaux v. Steinkeller, 6 Bing. N. C. 84. In Swift v. Winterbotham, L. R. 8 Q. B. 244, 42 L. J. Q. B. 111, a false representation signed by the manager of a banking company in the course of his business was held to be a signature by the party to be charged within the meaning of the Act, so as to render the banking company liable as well as the manager; but on appeal the decision was overruled on this point, Swift v. Jewsbury, L. R. 9 Q. B. 301, Cam. Scacc., 43 L. J. Q. B. 56; see also Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259, 36 L. J. Ex. 147.7

The action for a misrepresentation in the nature of deceit seems to [have been] an exception from the general rule, that in actions for words, or special damage arising therefrom, the very words must be set out, *Gutsole* v. *Mathers*, 5 Dowl. 69, 1 M & W. 495; *Bailey* v. *Walford*, 9 Q. B. 197.

As to the effect of simple concealment of defects upon a contract of sale, see Keates v. Lord Cadogan, 10 C. B. 591 [Horsfall v. Thomas, 1 H. & C. 90; 31 L. J. Exch. 322. Of passive acquiescence by the seller in the self-deception of the buyer; Smith v. Hughes, L. R. 6 Q. B. 597, 40 L. J. Q. B. 221. In Ward v. Hobbs, 3 Q. B. D. 150, 47 L. J. Q. B. 90, 4 App. Cas. 13, 48 L. J. C. P. 281, it was held by the Q. B. D. that exposing for sale in a market and selling pigs known by the seller to be affected with a contagious disease, rendered him liable to an action for false representation. The decision was reversed on appeal]. As to the effect of fraudulent misrepresentations of the purpose for which the subject of demise was to be used upon the validity of a lease, see Feret v. Hill, 15 C. B. 207. [This subject was much considered in Reg. v. Sadler's Co., 4 B. & S. 570; 30 L. J. Q. B. 186, 194; in Dom. Proc. 10 H. of L. C. 404; and 32 L. J. Q. B. 337.

When a person has been induced to buy goods by a fraudulent misrepresentation, he is in general not only entitled to sue the seller for the fraud, but may also, on discovering it, rescind the contract, and if he has paid the price, recover it back under a count for money had and received to his use, provided he can restore the article sold in the same state as that in which he received it; Clarke v. Dixon, E. B. & E. 148, and the cases there cited. So likewise where there is a condition that if the article does not answer the description or warranty it may be returned within a certain time; and the fact that the article has in the meantime become depreciated in value without default of the purchaser, does not destroy his right to return it (Head v. Tattersall, L. R. 7 Exch. 7, 41 L. J. Exch. 4); and for the like reasons a person who has been induced to purchase shares in a company by the fraudulent representations of directors may rescind the contract provided he do so within a reasonable time, Oakes v. Turquand, L. R. 2 H. L. 325; Venezuela Co. v. Kisch, L. R. 2 H. L. 39; Reese River Silver Mining Co. v. Smith, L. R. 4 H. L. 64; Houldsworth v. City of Glasgow Bank, 5 App. Cas. 317.

But where the false representation amounts only to a warranty, and the sale is of a specific ascertained article, no such remedy exists; for in such cases the property (unless the contrary appears to have been intended by the parties) passes by the sale; Dixon v. Yates, 5 B. & Ad. 340; Gilmour v. Supple, 11 Moore, P. C. C. 551; and the warranty being merely a collateral undertaking in consideration of the contract of sale, a breach of it affords no ground for rescinding the contract. See Foster, app. Smith, resp., 18 C. B. 156; and the judgments in Street v. Blay, 2 B. & Ad. 456; and Mondel v. Steele, 8 M. & W. 858; Hinchcliffe v. Barwick, 5 Ex. D. 177; 49 L. J. Ex. 495. The term warranty is, however, constantly applied (notwithstanding the protest of Lord Abinger, in Chanter v. Hopkins, 4 M. & W. 404) to descriptions given of the subject-matter of the sale, in cases where the sale is not of a specific article, but only of a certain description of article; cases, therefore, where the property cannot pass by the bargain; see Atkinson v. Bell, 8 B. & C. 277; Mucklow v. Mangles, 1 Taunt. 318. In such cases, compliance with the so-called warranty is a condition precedent to the purchaser's liability to accept or pay, and if the article tendered does not correspond with the given description, the purchaser is entitled to reject it, and (if he has paid for it) to recover the price as money received to his use. See Lucy v. Mouflet, 5 H. & N. 229; Wieler v. Schilizzi 17 C. B. 619; Macdonald v. Longbottom, 1 E. & E. 977, 28 Law, J. Q. B. 292; Bannerman v. White, 10 C. B. N. S. 844; 31 L. J. C. P. 28; Josling v. Kingsford, 13 C. B. N. S. 447; Azemar v. Casella, L. R. 2 C. P. 431 & 677, 36 L. J. C. P. 124, 263. Questions of much nicety often arise in considering whether the inferior character of an article which the parties have treated as the subject of a sale renders it not an article of the kind of which it was supposed to be on the sale, or is merely a breach of a collateral warranty. If the case is of the former class, as where a gilt bar is innocently sold as a bar of gold, the purchaser may recover the price paid as money received to his use; if the case belongs to the latter class, the only remedy open to him is an action for the breach of warranty. See Jones v. Ryde, 5 Taunt. 488; Gompertz v. Bartlett, 2 E. & B. 849; Couturier v. Hastie, 8 Exch. 40, reversed in error, Cam. Scacc. 9 Exch. 102; Dom. Proc. 5 H. L. C. 102; Hall v. Conder, 2 C. B. N. S. 22; Heilbutt v. Hickson, 41 L. J. C. P. 228, L. R. 7 C. P. 438.

The law upon the whole question under discussion is thus stated in the judgment of Blackburn, J., in *Kennedy* v. *Panama*, &c., *Mail Co.*, L. R. 2 Q. B. at p. 587. "There is," he says, "a very important difference between cases where a contract may be rescinded on account of fraud and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudu-

lent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be, and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse, and were in error, yet the purchaser must pay the whole price unless there was a warranty, and even if there was a warranty he cannot return the horse and claim back the whole price unless there was a condition to that effect in the contract. Street v. Blay, 2 B. & Ad. 456."

And compare the doctrine of the civil law Digest, lib. 18, Tit. 1. De contrahendâ emptione leges, 9, 10, 11, cited in the same judgment.

As to the further implied warranty that goods which answer a particular description or correspond to sample are also merchantable, see Jones v. Just, L. R. 3 Q. B. 197; 37 L. J. Q. B. 89; Mody v. Gregson, L. R. 4 Exch. 49; 38 L. J. Ex. 12. And notwithstanding some dicta in the cases of Readhead v. The Midland Rail. Co., L. R. 4 Q. B. 379; 38 L. J. Q. B. 169, and Francis v. Cockrell, L. R. 5 Q. B. 503; 39 L. J. Q. B. 113, it is now settled that, where a chattel is sold for a specific purpose, there is an absolute implied warranty that it is reasonably fit for that purpose, and the vendor is liable although the unfitness proceed from latent defects not discoverable by ordinary care; Randall v. Newson, 2 Q. B. D. 102; 46 L. J. Q. B. 259, and see the observations of Kelly, C. B., ibid.

As to the warranty on a contract of letting a chattel, see *Hyman* v. *Nye*, 6 Q. B. D. 685; *Fowler* v. *Lock*, L. R. 10 C. P. 90; *Robertson* v. *Amazon*, &c., Co., 7 Q. B. 598; 51 L. J. Q. B. 68.

As to the admissibility of parol evidence in Chancery, to show that the parties to a written instrument of sale were mistaken as to the subject of it, see Price v. Ley, 34 L. J. Cha. 530; Kennedy v. Panama Mail Co., ubi supra.]

1. Chandelor v. Lopus often misunderstood. — Much of the confusion and inconsistency, real or apparent, in American decisions on the subject of Warranty, has arisen from a misunderstanding of this leading case. A good illustration is found in the remarks of Chief Justice Parker in Bradford v. Manly, 13 Mass. 139 (1816), in the course of which he says it "would not now be received as law in England; certainly not in our country," and in those of Chief Justice Gibson in Borrekins v. Bevan, 3 Rawle 22, 44 (Penn. 1831), where he expresses regret that the excellent rule established in it has been "swept away by a flood of innovation in England and some of our sister States."

Each of these eminent men, one approving and the other

rejecting the supposed principle, evidently considered that the Justices and Barons, Anderson excepted, decided that the fact that a goldsmith, having skill in jewels and precious stones. affirmed to a customer that a stone was a Bezoar stone, and on the strength of that statement sold it to him for a hundred pounds, when it was not a Bezoar, does not afford any evidence to justify the inference that the goldsmith contracted or agreed in consideration of the purchase of the stone and payment of the price that the stone bought was really what he described it to be. Others have supposed that it was meant that the use of the word warrant or some particular form of expression was necessary to constitute a warranty. If either of these contentions is correct the case is only worthy to be relegated to the rubbish of the past, for such is not the law in any American State. This is too well settled to require the citation of authorities. They can be accumulated by the page.

It can, on the contrary, be easily shown that the decision was correct and is law everywhere to-day.

2. What was decided.—It appears that the decision was given on a motion to arrest the judgment, "because the declaration contains not matter sufficient to charge the defendant." The question was precisely the same that it would have been on a general demurrer.

It is only with respect to objections apparent on the record that such motions can be made. Stephen on Pleading, 97. The court therefore did not and could not consider what were the facts, or the merits, or the evidence, but simply the question, does the declaration state facts sufficient to constitute a cause of action. Two possible forms of declaring were considered. First, one in tort for deceit. For this the allegations were insufficient, because no scienter, i.e. intentional false statement, was alleged. Second, one in contract on a warranty. If there was a contract, the question of fraud became immaterial. In this aspect the declaration was just as imperfect as before, for, though it stated a fact from which a contract might be inferred, it did not state the legal effect of this fact. In other words, the plaintiff simply pleaded evidence which was not issuable. Stephen on Pleading, 390.

Two things were decided, and only two. One a rule of pleading, stated by Stephen as "things are to be pleaded according to their legal effect or operation." The other that a

mere affirmation made on the occasion of a sale, unless made as a contract or made fraudulently, is immaterial, and if either of these is relied upon it must be pleaded accordingly. For an excellent criticism of this aspect of the case see Harvard Law Review, vol. 1, No. 4, at page 191. Neither of these points was novel or particularly important, so the case as it stands, though entirely correct, is more useful as a text for a dissertation than as a statement of substantive law.

3. Proper form of action for false representations. — The general rule is that an action of tort cannot be brought on a contract, but, owing either to the fact that the action of assumpsit was originally an action on the case for a personal wrong resulting from the defendant's breach of promise, which was always alleged in the pleadings to have been fraudulent, or owing to the practical difficulty of determining beforehand what view the court and jury will take of the evidence, the border line between a warranty without fraud and fraud without warranty being so indistinct, especially where no express statement was made and there is nothing but the circumstances and the conduct of the seller to go by, or perhaps owing to both these facts, it has now become well settled that the plaintiff can declare in an action on the case and recover by proving a warranty, without evidence of fraud or intentional false representation. That is to say, where there is a contract of warranty, the buyer can always waive the contract and sue in tort. Schuchardt v. Allens, 1 Wall. 359; Blanton v. Wall, 4 Jon. 532; McLeod v. Tutt, 1 How. (Miss.) 288; Osgood v. Lewis, 2 Harr. & G. 495; Hillman v. Wilcox, 30 Me. 170; House v. Fort, 4 Blackf. 293; Trice v. Cockran, 8 Gratt. 442; Lassiter v. Ward, 11 Ired. 443; Beeman v. Buck, 3 Vt. 53; West v. Emery, 17 Id. 584; Vial v. Strong, 10 Id. 457; Bartholomew v. Bushnell, 20 Conn. 271; Vanleer v. Earle, 26 Penn. St. 277; Carter v. Glass, 44 Mich. 154; Hopkins v. O'Neil, 46 Mich. 403. The scienter may be disregarded even if averred. Booth v. Northrop, 27 Conn. 325; Huston v. Plato, 3 Col. 402; Lindsey v. Mulqueen, 26 Hun. 485.

Some of these cases have gone so far as to decide that on a single count in tort a plaintiff can recover by proving warranty without fraud or fraud without a warranty; Beeman v. Buck, 3 Vt. 53; West v. Emery, 17 Id. 584; Vail v. Strong, 10 Id. 457.

In others the court has declined to go quite so far; Bartholomew v. Bushnell, 20 Conn. 271. All difficulty may be avoided by joining a count for deceit with a count in tort alleging a simple breach of warranty; Schuchardt v. Allens, 1 Wall. 359. By thus having two counts in tort a great advantage is gained, and the technical difficulty which, in absence of statutory provision, prohibits the joining of a count in contract with one in tort, is avoided; Humiston v. Smith, 22 Conn. 19.

4. Distinctions to be borne in mind.—This anomalous form of pleading has given rise to much confusion, through attempts to apply to actions of assumpsit for breach of a contract rules laid down where, on similar facts, the action was in tort.

In some cases, where there was no express warranty and no false representation in words, discrimination has not been made between evidence of circumstances from which the law can imply a promise and evidence showing intentional deceit. In others what was discussed as a question of warranty was in reality one of condition precedent. For example, if a contract calls for beans and peas are tendered it is a breach of the principal contract, and whether or no there was a collateral warranty is irrelevant.

The precise facts and the form of pleading must be first carefully examined before judging of any decision.

5. Nature of a Warranty. — A warranty is a statement of fact as to an article sold, coupled with an agreement to make the statement good.

It has no effect as a contract until the sale is complete; so in a case where the title is not to pass until full payment is made, the buyer cannot, before that happens, sue on a warranty though he has possession of the goods and has paid instalments; Frye v. Milligan, 10 Ont. R. 509. It may be made or promised, however, at the very beginning of the negotiations if the bargain is finally consummated; Wilmot v. Hurd, 11 Wend. 584.

If made before the sale is completed, it requires no new consideration and in a sense forms part of the sale though it has nothing to do with the transfer of title; Cole v. Weed, 68 Wisc. (1887); Vincent v. Leland, 100 Mass. 432. If made after the sale, as regards consideration it is governed by the ordinary rules; Hogins v. Plympton, 11 Pick. 99; Bloss v. Kittridge, 5 Vt. 28; Towell v. Gatewood, 2 Scam. 24; Summers v. Vaughn, 35 Ind. 323; Grant v. Cadwell, 8 Up. Can. Q. B.

161; Morehouse v. Comstock, 42 Wisc. 626; Cougar v. Chamberlain, 14 Wisc. 258. The question of consideration is never material in case of implied warranties, as they arise, if at all, when the sale is made.

6. Express Warranties, except as regards the matter of consideration, do not differ from ordinary contracts. If the vendor intends to contract that a material statement made by him is true, and the buyer relies upon it as such, there is a warranty, without regard to the form of words. Where the surrounding circumstances throw any light upon it, it is a question of fact for the jury whether any particular ambiguous expression was a positive assertion of fact or mere praise or the expression of an opinion; Ayres v. Parks, 3 Hawks. 59; Erwin v. Maxwell, 3 Murphey 241; Horton v. Green, 66 N. C. 596; Cook v. Mosely, 13 Wend. 277; Tuttle v. Brown, 4 Gray 457; Roberts v. Morgan, 2 Cow. 438; Foster v. Caldwell, 18 Vt. 176.

Where there is found to be a positive assertion intended to be relied upon, and relied upon as a matter of fact, it has sometimes been held that intention to warrant is presumed, i. e. that such assertion constitutes a warranty in law; Commonwealth v. Jackson, 132 Mass. 16; Reed v. Hastings, 61 Ill. 266; Hawkins v. Pemberton, 51 N. Y. 198; Kenner v. Harding, 85 Ill. 268; Daniells v. Aldrich, 42 Mich. 58; Stroud v. Pierce, 6 Allen 413.

Other decisions make it a question for the jury in all cases; Beeman v. Buck, 3 Vt. 53; House v. Fort, 4 Blackf. 294; Foster v. Caldwell, 18 Vt. 176; Ender v. Scott, 11 Ill. 35; McFarland v. Newman, 9 Watts 55.

If the contract of sale is reduced to writing, the ordinary rule is applied, and, if the action is assumpsit, the writing is conclusively presumed to embody the whole contract, and oral warranties, made at the same time or previously, cannot be shown to add to or vary it; Lamb v. Krafts, 12 Met. 353; Pender v. Fobes, 1 Dev. & Bat. 250; Reed v. Wood, 9 Vt. 286; Wood v. Ashe, 1 Strobh. 407; Whitmore v. So. Boston Iron Co., 2 All. 58; Boardman v. Spooner, 13 All. 353; Dean v. Mason, 4 Conn. 432; Frost v. Blanchard, 97 Mass. 155; Mumford v. MacPherson, 1 Johns. 414; Merriam v. Field, 24 Wisc. 640; Van Ostrand v. Reed, 1 Wend. 424; Randall v. Rhodes, 1 Curtis, C. C., 90; Galpin v. Atwater, 29 Conn. 93; Shepherd v. Gilroy, 46 Ia. 193; Jones v. Alley, 17 Minn. 292;

Thompson v. Libbey, 34 Minn. 374; Bush v. Bradford, 15 Ala. 317; McClure v. Jeffrey, 8 Ind. 79; Mullein v. Thomas, 43 Conn. 252; Johnson v. Bartley, 81 Ind. 406; Mast v. Pearse, 58 Ia. 579; DaLee v. Blackburn, 11 Kan. 190; King v. Clogg, 40 Md. 341; Rice v. Forsyth, 41 Md. 349; Peltier v. Collins, 3 Wend. 459; Roe v. Batcheldor, 41 Wisc. 360.

This rule has no application to implied warranties; Topp v. White, 12 Heisk. 165.

It must appear that the parties intended to reduce the contract to writing, and the mere fact of giving a receipt for the purchase money, or an informal bill of parcels, or memorandum, or schedule of the property sold will not exclude proof of oral warranties; Hersom v. Henderson, 21 N. H. 224; Perrine v. Cooley's Ex'ors, 39 N. J. Law Rep. 449; Filkins v. Whyland, 24 N. Y. 338; Koop v. Handy, 41 Barb. 454; Gordon v. Waterous, 36 Upper Can. Q. B. 321; MacMullen v. Williams, 5 Ont. App. 518; Hazard v. Loring, 10 Cush. 267; Boorman v. Jenkins, 12 Wend. 566; Cassidy v. Begoden, 6 Jones & Sp. 180; Sutten v. Crosby, 54 Barb. 80; Wallace v. Rogers, 2 N. H. 506; Schenck v. Sanders, 13 Gray 37; Fletcher v. Willard, 14 Pick. 464; Hildrith v. O'Brien, 10 All. 104; Stacy v. Kempf, 97 Mass. 168; Atwater v. Clancey, 107 Mass. 369.

Although parol statements cannot be incorporated with a written contract, they will, if fraudulent, and preceding or accompanying such contract, when relied upon by the vendee, be a sufficient ground for either an action of deceit or for avoiding a sale altogether on the score of fraud; Mumford v. MacPherson, 1 John. 414; Wilson v. Marsh, 1 John. 504; Cozzins v. Whitaker, 3 Stew. & Port. 322.

7. Warranties by agents. — It has frequently been held that a general authority to sell carries with it an authority to warrant; Leroy v. Bard, 8 How. 451, 467; Herring v. Skaggs, 62 Ala. 180; Sandford v. Handy, 23 Wend. 260 (268); Deming v. Chase, 48 Vt. 382; Murray v. Brooks, 41 Ia. 45; Boothby v. Scales, 27 Wisc. 635; Talmadge v. Bierhause, 103 Ind. 270; Flat v. Osborn, 33 Minn. 98.

And some cases go so far as to decide that authority to effect a particular sale also carries with it a power to warrant unless warranty is positively forbidden; Alexander v. Gibson, 2 Camp. 555; Sandford v. Handy, 23 Wend. 260; Nelson v. Cowing, 6 Hill. 336; Monte Allegre, 9 Wheat. 616, 646; Schuchardt v.

Allens, 1 Wall. 359; Franklin v. Ezell, 1 Sneed 197; Hunter v. Jameson, 6 Ired. 252.

To the contrary, however, in absence of any usage or custom to that effect, see Cooley v. Perrine, 41 N. J. Law 322, and Perrine v. Cooley, 42 N. J. Law 623; Smith v. Tracy, 36 N. Y. 79; State v. Fredericks, 47 N. J. Law 469; Herring v. Skaggs, 73 Ala. 446.

Where there is such a custom it may be that an agent to sell may be supposed to have authority to warrant and so to sell in the usual way; Herring v. Skaggs, 62 Ala. 180; Skinner v. Gun, 9 Porter 305; Gaines v. McKinley, 1 Ala. N. S. 446; Bradford v. Bush, 10 Ala. 386.

The occupation of the agent is material, and any warranty, not expressly authorized, made out of the usual course of his business, certainly does not bind his principal; Sandford v. Handy, 23 Wend. 260.

For example, auctioneers known to be such cannot ordinarily bind the owner without authority; Bigelow, J., in Blood v. French, 9 Gray 198; Schell v. Stevens, 50 Missouri 375. Nor ordinary brokers; Dodd v. Farlow, 11 Allen 426.

In a few cases it has been held that a general selling agent, in the absence of any usage or custom to that effect, has not an unrestricted authority nor power to warrant; Upton v. Suffolk Co. Mills, 11 Cush. 586; Palmer v. Hatch, 46 Mo. 585. Of course in any case an unauthorized warranty of any agent may be ratified. As to what will amount to ratification see Smith v. Tracy, 36 N. Y. 79; Combs v. Scott, 12 Allen 493; Bennett v. Judson, 21 N. Y. 230; Kennedy v. Mackay, 43 N. J. Law 288; Elwell v. Chamberlain, 4 Bosw. 328; Fitzsimmons v. Joslin, 21 Vt. 129; Doggitt v. Emerson, 3 Story 700; Olmsted v. Hotaling, 1 Hill 317.

False representations by an agent on a material point or a warranty in the excess of his powers will in most cases at least justify the intervention of equity to annul the contract or a refusal by a court of law to enforce it while still executory; Fitzsimmons v. Joslin, 21 Vt. 129; Concord Bank v. Gregg, 14 N. H. 331; Doggitt v. Emerson, 3 Story 700, 1 W. & M. 295; Robeson v. Calze, 1 Douglas 228; Sandford v. Handy, 23 Wend. 260; Cassard v. Hinman, 6 Bosw. 8; Crump v. U. S. Mining Co., 7 Gratt. 352.

As to what circumstances will be sufficient evidence of

authority to an agent to warrant, see Melby v. Osborn, 33 Minn. 492; Vogel v. Osborn, 32 Minn. 167; Eadie v. Ashbaugh, 43 Ia. 519; Churchill v. Palmer, 115 Mass. 310; Smilie v. Hobbs, 2 N. E. Rep. 845 (N. H. 1886).

8. Interpretation of warranties. — The interpretation or construction of an express warranty, like that of any other contract, is for the court. This is true whether the contract is written or oral. The only difference is that in the latter case the jury may have to determine what the words of contract actually were; Short v. Woodward, 13 Gray 86; Wason v. Rowe, 16 Vt. 525; Snow v. Schomacker, 69 Ala. 111; Kingsley v. Johnson, 49 Conn. 462.

One of the most common warranties is that of soundness in a horse. Cribbing has been held an unsoundness; Washburn v. Cuddihy, 8 Gray 430; Walker v. Hoysington, 43 Vt. 608; Dean v. Morey, 33 Ia. 120. Whether corns constitute unsoundness has been held a question for the jury; Alexander v. Dutton, 58 N. H. 282. Permanent lameness is an unsoundness; Brown v. Bigelow, 10 Allen 242. A temporary cold is not; Springstead v. Lamson, 23 How. Pr. 302. Nor is any other temporary and curable disease or injury existing at the time of the sale which does not materially affect the usefulness of the horse for service; Roberts v. Jenkins, 21 N. H. 119. Contra, Korneguy v. White, 10 Ala. 255. The disease need not necessarily be incurable to constitute unsoundness; Thompson v. Bertrand, 23 Ark. 731. Nor does the disease need to be sufficiently developed at the time of sale to unfit the horse for use; Woodbury v. Robbins, 10 Cush. 520; Hook v. Stovall, 21 Ga. 69; Crouch v. Culbreath, 11 Rich. 9; Fordren v. Durfee, 39 Miss. 324; Kenner v. Harding, 85 Ill. 265.

9. Obvious defects. — To give either an action in contract or tort the buyer must rely on the statement made. So it has frequently been held that, where the defect was known to him, he cannot rely on a general warranty; Hill v. North, 34 Vt. 604; Williams v. Ingram, 21 Tex. 300; Dillard v. Moore, 7 Ark. 166; Jordan v. Foster, 11 Ark. 441; McCormick v. Kelly, 28 Minn. 137; Van De Walker v. Osmer, 65 Barb. 566; Hudgins v. Perry, 7 Ired. 402; Bennett v. Buchan, 76 N. Y. 386; Long v. Hicks, 2 Humph. 305; Schuyler v. Rose, 2 Caines 202; Marshall v. Drawhorn, 27 Ga. 275; Leavitt v. Fletcher, 60 N. H. 182.

Usually where the defect is apparent, the warranty is not relied upon; but, where it is to any extent, the fact that the buyer may have known of the defect will not deprive him of a remedy; Pinney v. Andrus, 41 Vt. 631; Nat'l Bank v. Grindstaff, 45 Ind. 158; Fletcher v. Young, 69 Ga. 591; Fisher v. Pollard, 2 Head 314; Shewalter v. Ford, 34 Miss. 417; Wallace v. Frazier, 2 N. & M.C. 516; Stucey v. Clyburne, Cheves. 186; Wilson v. Ferguson, Cheves. 190; Thompson v. Botts, 8 Mo. 710; Gallaway v. Jones, 19 Ga. 277. The question does not usually arise where the defect is only discernible by a person having special skill; Birdseye v. Frost, 34 Barb. 367; Meickley v. Parsons, 66 Ia. 63; Vates v. Cornelius, 59 Wisc. 615. Or where the seller by artifice conceals the defects which would otherwise be visible; Chadsey v. Green, 24 Conn. 562; Kenner v. Harding, 85 Ill. 264; Gant v. Sheldon, 3 B. Mon. 423; Robertson v. Clarkson, 9 B. Mon. 507.

10. Implied warranties. — A contract of warranty may be made by actions as well as by words. In the former case they are called "Implied Warranties," and certain rules have become established as to their existence or non-existence. Where there is an express warranty, no implied warranty can exist, unless it be one of title, as parties are supposed to have expressed their whole intention; Jackson v. Langston, 61 Ga. 392; International Pavement Co. v. Smith, 17 Mo. App. 264; Baldwin v. VanDuzen, 37 N. Y. 487; Deming v. Foster, 42 N. H. 175; McGraw v. Fletcher, 35 Mich. 104; Mullain v. Thomas, 43 Conn. 252; Wells v. Spears, 1 McCord 421; Wood v. Ashe, 3 Strobh. 64; Trimmier v. Thompson, 10 S. C. 164.

Except in South Carolina the universal rule in the ordinary case of the sale of an existing specific chattel, inspected or selected by the buyer or subject to his inspection, is that there is no warranty of quality unless it be clearly expressed. Alabama: Cozzins v. Whitaker, 3 Stew. & Port. 322; West v. Cunningham, 9 Porter 104. Arkansas: Turner v. Huggins, 14 Ark. 22. California: Moore v. McKinlay, 5 Cal. 471; Byrne v. Jansen, 50 Cal. 624; Johnson v. Powers, 65 Cal. 181. Connecticut: Dean v. Mason, 4 Conn. 428; Frazier v. Harvey, 34 Conn. 469; Drew v. Roe, 41 Conn. 50. Georgia: Falkner v. Lane, 58 Ga. 116. Illinois: Roberts v. Hughes, 81 Ill. 130; Morris v. Thompson, 85 Ill. 16. Indiana: Humphreys v. Comline, 8 Blackf. 516; Thomas v. Clemmer, 50 Ind. 10. Iowa: Deane

v. Morey, 33 Ia. 120; Richardson v. Bouck, 42 Ia. 185. Kansas: Graffenstein v. Epstein, 23 Kans. 443. Kentucky: Scott v. Renwick, 1 B. Mon. 64; Standiford's Ad'm v. Schultz, 5 B. Mon. 581. Maine: Kingsbury v. Taylor, 29 Me. 508. Maryland: Tagmon v. Mitchell, 1 Md. Chancery 496; Johnson v. Cope, 3 H. & J. 89; Hyatt v. Boyle, 5 Gill. & J. 110. Massachusetts: Winsor v. Lombard, 18 Pick. 59; Mixer v. Coburn, 11 Met. 559; Poland v. Brownell, 131 Mass. 138. Mississippi: Otto v. Alderson, 10 S. & M. 476. Missouri: Joliff v. Collins, 21 Mo. 338. New York: Seixas v. Wood, 2 Caines 45; Holden v. Dakin, 4 John. 421; Swett v. Colgate, 20 John. 190; Welch v. Carter, 1 Wend. 185; Wright v. Hart, 18 Wend. 449 (a leading case); Moses v. Mead, 1 Denio 378; Beirne v. Dord, 4 Sandf. 89; Hargous v. Stone, 5 N. Y. 73; Hawkins v. Pemberton, 51 N. Y. 198; Day v. Pool, 52 N. Y. 416. Ohio: Hadley v. Clinton, 13 O. St. 502 (a leading case). Pennsylvania: Jackson v. Wetherell, 7 S. & R. 480; MacFarland v. Memmer, 9 Watts 55; Eagan v. Call, 34 Penn. St. 236; Weimer v. Clement, 37 Penn. St. 147; Lord v. Grow, 39 Penn. St. 88; Whitaker v. Eastwick, 75 Penn. St. 229; Warren v. Philadelphia Coal Co., 83 Penn. St. 437; Ryan v. Ulmer, 108 Penn. St. 332. Vermont: Stevens v. Smith, 21 Vt. 90.

11. Rule in South Carolina. — In this single State, from the earliest times, it has been held that "selling for a sound price raises in law a warranty of the soundness of the thing sold; and this warranty applies to all faults known and unknown to the seller." Timrod v. Scoolbread, 1 Bay. 324 (1793); in which the courts say "it has often been decided in our courts." Lester v. Graham, 1 Mill. 182; Mitchell v. Duboise, 1 Mill. 360; Vaughn v. Campbell, 2 Brev. 53.

The rule applies to auction sales as well as private sales; Duncan v. Bell, 2 Nott. & M'C. 153; Rose v. Beatie, 2 Nott. & M'C. 538. But not to judicial sales; Tunno v. Flood, 1 McCord 121; Robinson v. Cooper, 1 Hill. 287. Nor to sales by a sheriff; Thayer v. Sheriff, 2 Bay. 169; Davis v. Murray, 2 Mill. 143; Yates v. Bond, 2 McCord 382. Nor to a sale of an unnegotiable security; Coalburn v. Matthews, 1 Strobh. 232.

The only cases where the rule does not apply are those where the vendor makes a special warranty, thereby showing the intention of the parties to limit his responsibility, and those where the defect is known to the buyer; McLoughlin v. Horton, 1 Hill. 383; Wood v. Ashe, 1 Strobh. 407.

12. Identity of kind. —It is commonly said that there is in America an implied warranty that the article sold shall be of the same kind that it is described to be or appears to be from the sample shown. As has already been noticed, many of the cases where this question is discussed are simply cases where the express contract has been broken and the goods contracted to be delivered have not been tendered. Under these circumstances, whether the purchaser returns or keeps the goods, he is entitled to show that they are not such as he agreed to buy, either in an action against the seller for not fulfilling the contract or in a defence to an action against himself for the price. It only causes confusion in such case to talk about an implied warranty of identity. The following cases, frequently cited for the proposition that such an implied warranty exists, were all cases where the question of warranty was immaterial: Borrekins v. Bevan, 3 Rawle 23; Hastings v. Lovering, 2 Pick. 214: Mixer v. Coburn, 11 Met. 559; Osgood v. Lewis, 2 Harr. & G. 495; Kellogg v. Denslow, 14 Conn. 411; Wright v. Barnes, 14 Conn. 519: Howard v. Hoev, 23 Wend. 359.

The principal other cases on the subject are Edgar v. The Canadian Oil Co., 23 Upp. C. Q. B. 333; Baker v. Lyman, 38 Upp. C. Q. B. 498; Mader v. Jones, 1 Russell & Chesney (Nova Scotia) 82; Henshaw v. Robbins, 9 Met. 87; Hard v. Faribanks, James 422; Wier v. Bissett, 2 Thomp. 178; Hawkins v. Pemberton, 51 N. Y. 198. A sale of "blue vitriol sound and in good order." The article delivered was composed of a mixture of blue vitriol and green vitriol. Held that the description amounted to a warranty of the article, modifying the earlier decisions; Walcott v. Mount, 36 N. J. Law 262. A sale of "early strap-leaf red-top turnip seed." The seed proved to be a late kind of turnip seed. This was held a warranty of the kind of seed. To the same effect was Hoyt v. Miller, 71 N. Y. 118. A sale of "large Bristol cabbage seed." Van Wyck v. Allen, 69 N. Y. 61, was a similar case. See also Bagley v. Cleveland Rolling Mill, 21 Fed. Rep. 159; Flint v. Lyon, 4 Cal. 17; Catchings v. Hacke, 15 Mo. Appeal 51; Bach v. Leavy, 18 Jones & S. 519; Lewis v. Rountree, 78 N. C. 323; Whittaker v. McCormick, 6 Mo. App. 114.

Where the sale is by description, in some instances, words denoting quality may be so positive and definite that the same rule will apply to them as to words denoting kind. For example, in Hastings v. Lovering, 2 Pick. 214, the sale note read "two thousand gallons prime quality winter oil," and these words were held to import a warranty not only that the article was winter oil but also that it was of prime quality. Other cases of the same kind are: Forcheimer v. Stewart, 65 Ia. 593, where the sale was of "choice sugar canvased hams;" Joselyn v. Proudfoot, 15 Upp. C. Q. B. 303, where a manufacturer sold flour as "Trafalgar Mills extra superfine." To the same effect see Bunnell v. Whitlaw, 14 Upp. C. Q. B. 241; 14 Pick. 100; 18 Pick. 60; Richmond Trading Co. v. Farquar, 8 Blatch. 89.

Ordinarily, such words do not imply a warranty, being considered too uncertain and indefinite. Hogins v. Plympton, 11 Pick. 97; Windsor v. Lombard, 18 Pick. 57; Coates v. Perry, 26 Upp. C. C. P. 40; Barrett v. Hall, 2 Aikens 269; Towell v. Gatewood, 2 Scam. 22; Carondelet Iron Works v. Moore, 78 Ill. 65; Fraleigh v. Bispham, 10 Penn. St. 320 (an excellent case); Ryan v. Ulmer, 108 Penn. St. 332; Rice v. Codman, 1 Allen 377.

13. Sales by sample. — In sales by sample there is said not only to be an implied warranty that the bulk shall be of the same kind, but also that it shall be of quality equal to what is shown.

Not all sales, however, where a sample is exhibited are properly sales by sample. To have an implied warranty the parties must contract solely with reference to the article exhibited, with the understanding that the bulk is like it. That is to say, the parties must understand that the sample is not only taken from the bulk but is a standard of its quality. Showing a portion of the goods instead of the whole does not necessarily constitute a sale by sample; Hargous v. Stone, 5 N. Y. 73; Ames v. Jones, 77 N. Y. 614; Selser v. Roberts, 105 Penn. St. 242; Proctor v. Spratley, 38 Va. 254; Bothwick v. Young, 12 Ont. Appeals 671 (1885); Salisbury v. Stainer, 19 Wend. 159; Barnard v. Kellogg, 10 Wall. 383 (an instructive case).

Whether the sale was strictly by sample or whether the buyer acted on his own judgment is a question for the jury; Jones v. Wasson, 3 Baxter (Tenn.) 211; Waring v. Mason, 18 Wend. 445; Barnard v. Kellogg, 10 Wallace 384. Evidence of

common usage is material; Atwater v. Clancey, 107 Mass. 369. And sometimes evidence is admissible to show that the sale was by sample where the contract was in writing if it does not distinctly define the article to be delivered; Pike v. Fay, 101 Mass. 134.

Properly speaking, the question of such implied warranty of quality, in case of sales by sample, seldom arises. As has been said of implied warranty of "identity of kind," in most of the cases where this expression has been used, the seller had simply not executed the contract by tendering what he had agreed to sell, of course entitling the buyer to refuse to receive or pay for the goods.

Among the leading cases in which it has been held there was such implied warranty are the following: - California: Moore v. McKinlay, 5 Cal. 471; Hughes v. Bray, 60 Cal. 284. Connecticut: Merriman v. Chapman, 32 Conn. 146. Georgia: Wilcox v. Howard, 51 Ga. 298. Illinois: Hanson v. Busse, 45 Ill. 499; Hubbard v. George, 49 Ill. 275; Webster v. Granger, 78 Ill. 230; Converse v. Hartsfelt, 11 Bradw. 153. Iowa: Home Lightning Rod Co. v. Neff, 60 Ia. 138; Meyer v. Wheeler, 65 Ia. 390. Kansas: Gill v. Kaufman, 16 Kans. 571. Louisiana: Hall v. Plassan, 19 La. Ann. 11. Maryland: Gunther v. Atwell, 19 Md. 157. Massachusetts: Bradford v. Manley, 13 Mass. 139; Hastings v. Lovering, 2 Pick. 219; Williams v. Spafford, 8 Pick. 250; Henshaw v. Robbins, 9 Met. 86; Whitmore v. South Boston Iron Co., 2 Allen 52; Dickenson v. Gray, 7 All. 29; Lothrop v. Otis, 7 Allen 435; Schnitser v. Oriental Print Works, 114 Mass. 123. Minnesota: Day v. Raquet, 14 Minn. 273. Missouri: Graff v. Foster, 67 Mo. 512; Voss v. McGuire, 18 Mo. App. 477; Hollender v. Koelter, 20 Mo. App. 79. New Hampshire: Merrill v. Wallace, 9 N. H. 116; Boothby v. Plaisted, 51 N. H. 436. New York: Sands v. Taylor, 5 John. 395; Oneida Manufacturing Company v. Lawrence, 4 Cow. 440; Andrews v. Kneeland, 6 Cow. 354; Gallagher v. Warring, 9 Wend. 20; Warring v. Mason, 18 Wend. 425; Beebe v. Robert, 12 Wend. 412; Howard v. Hoey, 23 Wend. 350; Osborn v. Gantz, 60 N. Y. 540; Dike v. Reitlinger, 23 Hun. 241; Moses v. Mead, 1 Denio 378; Learnard v. Fowler, 44 N. Y. 289; Hargous v. Stone, 1 Selden 73. North Carolina: Reynolds v. Palmer, 21 Fed. Rep. 433. (See note to this case by John D. Lawton, Esq.) Ohio: Daton v. Hoogland, 39 O. St. 671. South Carolina: Rose v. Beattie, 2 Nott. & McC. 538. Texas: Brantley v. Thomas, 22 Tex. 270; Whitaker v. Hueske, 29 Tex. 355. United States: Schuchardt v. Allens, 1 Wall. 359; Barnard v. Kellogg, 10 Wall. 383. Virginia: Proctor v. Spratley, 78 Va. 254. Wisconsin: Getty v. Roundtree, 2 Chand. 28; Merriam v. Field, 24 Wisc. 640.

The proper way of pleading in case of a sale by sample is to set forth an agreement to sell goods corresponding with the sample, for, if a simple sale of goods is set forth with a warranty that they were equal in quality to a sample, this plea will not justify a return of the goods, nor be a good answer to an action for the purchase money except as showing a partial failure of consideration; Dawson v. Cullis, 10 C. B. 523.

14. Rule in Pennsylvania. — Owing to a misunderstanding of the early decisions, the Pennsylvania rule as to sale by a sample differs from that of all the other States, it being held that in case of an ordinary sale by sample there is no implied warranty that the quality of the bulk shall be the same as that of the sample, but only that the bulk shall be identical in kind and shall be merchantable; Boyd v. Wilson, 83 Penn. St. 319; compare West. Republic Co. v. Jones, 108 Penn. St. 55 (an instructive decision).

Under such a rule as this, commerce could not exist, and the defect has been cured by legislation to the effect that a sale by sample shall create an implied warranty of correspondence of the sample and the bulk; 13th of April, 1887, P. L. 21.

15. Merchantability. — Where the buyer does not select the goods and has no opportunity to inspect them, and the seller is in a position to know their quality, as for example where he is the manufacturer, there is ordinarily an implied warranty not only that the goods are of the kind and species that they are described to be, but also that they are merchantable, the doctrine of caveat emptor not applying. Contrary to the general rule, this implied warranty is sometimes held to exist where there is an express warranty as to other qualities; Merriam v. Field, 24 Wisc. 640; Gallagher v. Waring, 9 Wend. 28; Howard v. Hoey, 23 Wend. 350 (an instructive case); Brantley v. Thomas, 22 Tex. 270; McClung v. Kelley, 21 Ia. 508; Gammell v. Gumby, 52 Ga. 504; Misner v. Granger, 4 Gilm. 69; Wilcox v. Hall, 53 Ga. 635; Cullen v. Bimm, 37 O. St. 236;

Gaylord Manufacturing Co. v. Allen, 53 N. Y. 515; Fitch v. Archibald, 29 N. J. L. 160; Wilcox v. Owens, 64 Ga. 601.

There are many similar cases which carry the doctrine of implied warranty still farther, holding that where the seller is in a position to know the quality of the goods and the buyer is not, but orders them informing the seller for what use they are intended, and allowing him to select them, thus relying upon the seller's judgment, there is an implied warranty that the goods are fit for that particular use; Wilcox v. Owens, 64 Ga. 601; Brown v. Sayles, 27 Vt. 227; Hoe v. Sanburn, 21 N. Y. 552 (circular saws); Brag v. Morrill, 49 Vt. 45; Rogers v. Niles, 11 O. St. 48 (steam boilers); Cunningham v. Hall, 1 Sprague 404; Snow v. Schomacker Manufacturing Co., 69 Ala. 111; White v. Miller, 71 N. Y. 118 (garden seeds); Gammell v. Gumby, 52 Ga. 504; Wilcox v. Hall, 53 Ga. 635; Robson v. Miller, 12 So. Car. 536; French v. Vining, 102 Mass. 132 (hay for cattle); Best v. Flint, 58 Vt. 543 (hogs for market); Gerat v. Jones, 32 Gratt. 518 (tobacco boxes); Poland v. Miller, 95 Ind. 387 (whiskey barrels); Dounce v. Dow, 64 N. Y. 411; Wilson v. Danville, 4 L. R. Ir. 249; 6 L. R. Ir. 210 (distillery grains for cattle); Spurr v. The Albert Min. Co., 2 Haney (N. B.) 361; Beals v. Olmsted, 24 Vt. 114; Whitmore v. So. Boston Ice Co., 2 All. 273; Cunningham v. Hall, 4 All. 273; Rice v. Forsythe, 41 Md. 389, Bigelow v. Dexter, 38 Upp. C. Q. B. 452 (furnace for heating purposes); Pease v. Sabin, 38 Vt. 432 (cheese); Boothby v. Scales, 27 Wisc. 626; Thomas v. Simpson, 80 N. C. 4 (shingles); Overton v. Phelan, 2 Head. 445; Dawes v. Peebles, 6 Fed. Rep. 856; Howard v. Hoey, 23 Wend. 350 (a well considered case); Harris v. Waite, 51 Vt. 480 (gas metres); Pacific Guano Co. v. Mullen, 66 Ala. 582; Downing v. Dearborn, 77 Me. 457; Getty v. Roundtree, 2 Chand. (Wisc.) 28 (pump); Byers v. Chapin, 28 O. St. 300 (oil barrels); Robinson Machine Works v. Chandler, 56 Ind. 575; Brenton v. Davis, 8 Blatch. 317 (boat); Carver v. Hornberg, 26 Kans. 94; Fisk v. Tank, 12 Wisc. 276; Merrill v. Nightingale, 39 Wisc. 247; Pacific Iron Works v. Newhall, 34 Conn. 67; Port Carbon Iron Co. v. Groves, 68 Penn. St. 149; Curtis Manf. Co. v. Williams, 3 S. W. Rep. 517.

This rule is most frequently applied to the case of a sale by a manufacturer, where the defect would not be apparent even

on inspection. Where the seller is not a manufacturer, and the buyer does not rely upon the seller's judgment, the fact that the seller knows that the article is unfit for the purpose intended does not necessarily raise an implied warranty. In other words, if the purchaser thinks he knows what he wants and gets what he asks for, he takes it at his own risk of its fitness for the intended use; Demming v. Foster, 42 N. H. 165 (oxen for work); Height v. Bacon, 106 Mass. 10 (a leading case); County of Simcoe, etc., v. Wade, 12 Upp. C. Q. B. 614; Scott v. Renwick, 1 B. Mon. 63; Walker v. Pue, 57 Md. 155; Mason v. Chappell, 15 Gratt. 572; Farron v. Andrews, 69 Ala. 96; Warren Glass Works v. Keystone Coal Co., 22 Rep. (Md.) 551; Kohl v. Lindley, 39 Ill. 196 (an important case); Cogel v. Kniselev, 89 Ill. 598 (steam engine); Armstrong v. Bufford, 51 Ala. 410; Tilton Safe Co. v. Tisdale, 48 Vt. 83; Port Carbon Iron Co. v. Groves, 68 Penn. St. 149 (a case where the principle is particularly well stated); Shister v. Bagster, 109 Penn. St. 442 (also an interesting case).

16. Warranty of title. — Whatever doubt there may be as to the existence of other implied warranties, it is universally agreed in America that in every case of a sale of personal property by one in possession thereof, selling as absolute owner, there is an implied warranty of ownership; even in the absence of any express assertion of ownership and without regard to whether any defect in the title is known or not. This warranty is against defects and incumbrances of all kinds, and if the vendee is obliged to pay any prior incumbrancer, he can recover the amount of his vendor or deduct it from the price of the goods; Dresser v. Ainsworth, 9 Barb. 619; Brown v. Cockburn, 37 Upp. C. Q. B. 592; Sargent v. Currier, 49 N. H. 310; Harper v. Dotson, 43 Ia. 232.

By possession is meant not only actual custody, but all constructive possession, such as possession by bailee or agent. The warranty exists even where the vendor assigns over the bill of sale which he himself received, which is silent on the subject of warranty; Whitney v. Heywood, 6 Cush. 86; Shattuck v. Green, 104 Mass. 42.

It has been frequently said that the rule of caveat emptor applies where the vendor is out of possession; Jones v. Huggeford, 3 Met. 519; Bank of Northampton v. Mass. Loan Co., 123 Mass. 330; Bogert v. Christie, 24 N. J. Law 57; Krumbhaar v.

Birch, 83 Penn. St. 426; Whitney v. Heywood, 6 Cushing 82; Shattuck v. Green, 104 Mass. 42; Porter v. Bright, 82 Penn. St. 441; Huntington v. Hall, 36 Me. 501; Scott v. Hix, 2 Schneid. 192; Long v. Hiekingbottom, 28 Miss. 773; Hopkins v. Grinnell, 28 Barb. 537; Scanton v. Clark, 39 N. Y. 220; Storm v. Smith, 43 Miss. 497; Shepard v. Earles, 13 Hun. 651. But an examination of these cases shows that in most of them what was said on this point was obiter dicta. There seems no reason why, in every case where the vendor purports to sell an absolute and perfect title, he should not be held to warrant it.

Where the sale is made in another's right, there is no implied warranty of title in the party represented by the seller. Common examples of this are sales by sheriffs, executors, guardians, mortgagees, etc.; Monte Allegre, 9 Wheat. 616; Mockbee v. Gardiner, 2 Harr. & G. 176; Shepard v. Earles, 13 Hun. 651; Neal v. Gillespie, 56 Ind. 451; Ricks v. Dillahunty, 8 Port. 123; Baker v. Arnot, 67 N. Y. 448; Forsythe v. Ellis, 4 J. J. Marsh 298; Corwin v. Benham, 2 O. St. 37; Bingham v. Maxey, 15 Ill. 295; Hicks v. Skinner, 71 N. C. 539; Harrison v. Shanks, 13 Bush 620; Hensley v. Baker, 10 Mo. 157; Bostwick v. Winton, 1 Sneed 525.

There is a conflict of authority as to when action can be brought for breach of this implied warranty, some cases holding the cause of action exists immediately, whether the buyer has had to surrender the chattel or remove incumbrances upon it or not; Perkins v. Whelen, 116 Mass. 542; Grose v. Hennesey, 13 Allen 389; Payne v. Rodden, 4 Bibb. 304; Chancellor v. Wiggins, 4 B. Mon. 201; Word v. Cavan, 1 Head. 506; Dryden v. Kellogg, 2 Mo. App. 87; McCiffin v. Baird, 62 N. Y. 329; Mattheny v. Mason, 73 Mo. 677.

Others hold that the buyer must be disturbed in his possession before he can recover on the warranty or defend an action for the price; Sweetman v. Prince, 62 Barb. 256; Case v. Hall, 24 Wend. 102; Vibbard v. Johnson, 19 Johns. 77; Krumbhaar v. Birch, 83 Penn. St. 426; Wanser v. Mesler, 29 N. J. Law 256; Gross v. Kierski, 41 Cal. 111; Randon v. Toby, 11 How. 493; Linton v. Porter, 31 Ill. 107; Burt v. Dewey, 40 N. Y. 283.

Among the other important cases on the subject of implied warranty of title are the following, arranged by States: — Ala-

bama: Ricks v. Dillahunty, 8 Port. 134; Cozzins v. Whittaker, 3 Stew. & Port. 322: Williamson v. Sammons. 34 Ala. 691. Arkansas: Boyd v. Whitfield, 19 Ark, 447: Lindsay v. Laud, 24 Ark. 224. California: Gross v. Kierski, 41 Cal. 111. Connecticut: Starr v. Anderson, 19 Conn. 341. Florida: Lines v. Smith, 4 Fla. 47. Illinois: Morris v. Thompson, 85 Ill. 16. Indiana: Marshall v. Duke, 51 Ind. 62. Kentucky: Chism v. Woods, Hardin 531: Payne v. Rodden, 4 Bibb. 304: Scott v. Scott, 2 A. K. Marsh 215: Chancellor v. Wiggins, 4 B. Mon. 201: Richardson v. Tipton, 2 Bush 202. Maine: Hale v. Smith, 6 Greenl. 420: Eldridge v. Wadleigh. 3 Fair. 372: Butler v. Tufts, 13 Me. 302; Huntington v. Hall, 36 Me. 501; Thurston v. Spratt, 52 Me. 202. Maryland: Mockbee v. Gardiner, 2 Harr. & G. 176: Rice v. Forsyth, 41 Md. 389. Missouri: Matheny v. Mason, 73 Mo. 677; Dryden v. Kellogg, 2 Mo. App. 87: Donaldson v. Newman, 9 Mo. App. 235. Massachusetts: Emerson v. Brigham, 10 Mass. 202; Bucknam v. Goddard, 21 Pick. 71: Coolidge v. Brigham, 1 Met. 551; Dorr v. Fisher, 1 Cush. 273; Bennett v. Bartlett, 6 Cush. 225; Whitney v. Hevwood, 6 Cush. 80: Brown v. Pierce, 97 Mass. 46: Shattuck v. Green, 104 Mass. 42. Michigan: Hunt v. Sackett, 31 Mich. 18. Minnesota: Davis v. Nye. 7 Minn. 414. Mississippi: Long v. Hickinbottom, 28 Miss. 772; Storm v. Smith, 43 Miss. 497. New Hampshire: Sargent v. Currier, 49 N. H. 310. New Jersey: Wansler v. Messmer, 29 N. J. Law 256; Wood v. Shelden. 42 N. J. Law 421. North Carolina: Inge v. Bond, 3 Hawkes 101. New York: Heermance v. Vernoy, 6 Johns. 5; Vibbard v. Johnson, 19 Johns, 78: Scott v. Colegate, 20 Johns. 196; Case v. Hall, 24 Wend. 102; Rew v. Barber, 3 Cow. 272; Hoe v. Sanborn, 21 N. Y. 556; Burt v. Dewey, 40 N. Y. 283: McKnight v. Devlin, 52 N. Y. 401: McCov v. Archer, 3 Barb. 323; Giffin v. Baird, 62 N. Y. 329. Ohio: Darst v. Brockway, 11 O. 462. Pennsylvania: McCabe v. Moorehead, 1 W. & S. 513; Swazey v. Parker, 50 Penn. St. 441; Flynn v. Allen, 57 Penn. St. 482: Whittaker v. Eastwick, 75 Penn. St. 229; Krumbhaar v. Birch, 83 Penn. St. 426. South Carolina: Colcock v. Good. 3 McCord 513. Tennessee: Word v. Caven. 1 Head. 507: Trigg v. Farris. 5 Humph. 343: Gookin v. Graham, 5 Humph. 480. Vermont: Bank v. Bank, 10 Vt. 145; Thrall v. Newell, 19 Vt. 202; Patee v. Pelton, 48 Vt. 182: Gilchrist v. Hilliard, 53 Vt. 592. West Virginia: Burn

side v. Burdett, 15 W. Va. 702. Wisconsin: Lane v. Romer, 2 Chand. 61; Costigan v. Hawkins, 22 Wisc. 74; Croninger v. Paige, 48 Wisc. 229; Edgerton v. Michels, 34 American L. R. 260. (See note by David Stewart.)

17. Implied warranties in connection with the sale of commercial paper. — On every such sale the vendor impliedly warrants: First. — The genuineness of the signatures; Herrick v. Whitney, 15 Johns. 240; Merriam v. Wolcott, 3 Allen 258; Worthington v. Cowles, 112 Mass. 30; Cabot Bank v. Morton, 4 Gray 156; Shaver v. Ehle, 16 Johns. 201; Terry v. Bissell, 26 Conn. 23; Aldridge v. Jackson, 5 R. I. 218; Bissel v. McKim, 33 N. Y. 307; Wilder v. Cowles, 100 Mass. 487; Ross v. Terry, 63 N. Y. 613; Ward v. Haggard, 75 Ind. 381; Willson v. Binford, 81 Ind. 588; Bank v. Kurtz, 99 Penn. St. 344; Gilchrist v. Hilliard, 53 Vt. 592; Marshall v. Morgan, 58 Vt. 60.

Second. — That the signers are competent to contract; Lobdell v. Baker, 1 Met. 193; 3 Met. 469.

But not ordinarily that they are pecuniarily responsible; Day v. Kinney, 131 Mass. 37; Burgess v. Chapin, 5 R. I. 225; Beckwith v. Farnum, 5 R. I. 230; Swanzey v. Parker, 50 Penn. St. 450. Or that the note is not tainted with usury; Littauer v. Goldman, 72 N. Y. 506.

18. Sales of provisions. — There seems no sufficient reason why any different rule should be applicable to sales of provisions from that which ordinarily prevails. And it is now well settled, though there are dicta to the contrary, that in case of sales of animals intended for food, between dealers either wholesale or retail, not for immediate consumption by the buyer, there is no implied warranty of fitness for food from the mere fact that the thing was finally intended for that purpose; Howard v. Emerson, 110 Mass. 321 (a well considered case); Moses v. Mead, 1 Denio 378, affirmed 5 Denio 617; Humphreys v. Comline, 8 Blatchf. 516; Ryder v. Neitge, 21 Minn. 70.

It undoubtedly has many times been said that in all contracts for provisions it is implied that they are fit for consumption. In most of these cases, however, there was evidence shown that the vendor knew of the defect, and the action appears to have been for the deceit; Van Bracklin v. Fonda, 12 Johns. 468; Devine v. McCormick, 50 Barb. 116; Burch v. Spencer, 15 Hun. 504. The others come under the general rule laid down in paragraph 15, supra.

19. Usage. — It has been held that in case of a sale by sample it cannot be shown that the usage was to consider an implied warranty against latent defects to exist; Dickinson v. Gay, 7 Allen 29; Coxe v. Heisley, 19 Penn. St. 243.

Other cases where proof of usage was ruled out are Dodd v. Farlow, 11 Allen 426; Wetherill v. Neilson, 20 Penn. St. 448; and Whitmore v. South Boston Iron Co., 2 Allen 52.

In all these cases the principle seemed to be that the usage was contrary to the rules of the common law. Where not contrary, it is possible that custom or usage may modify the warranty that would otherwise be implied; Fatman v. Thompson, 2 Dinney 482; Schuitner v. Oriental Print Works, 114 Mass. 123.

20. Remedies for breach of warranty express or implied. — On principle, in absence of fraud, the only remedy is an action for damages, and this is the doctrine of the best considered cases: Kase v. John, 10 Watts 107; Voorhees v. Earle, 2 Hill 228; Carey v. Gruman, 4 Hill 626; Thornton v. Wynn, 12 Wheat. 183; West v. Cutting, 19 Vt. 536; Mayer v. Dwinell, 29 Vt. 298; Muller v. Eno, 4 Kern. 497; Kierman v. Rocheleau, 6 Bos. 148; Crabtree v. Kile, 21 Ill. 180; Getty v. Roundtree, 2 Chand. 28; Marsh v. Low, 55 Ind. 271; Walls v. Gates, 6 Mo. App. 242; Fregman v. Knecht, 78 Penn. St. 141; Mattison v. Holt, 45 Vt. 336.

The belief which is prevalent that the goods can be returned has arisen from careless expressions of the court in cases where there was fraud or where a different article from that sold was offered. Maryland and Massachusetts seem to be the only States where a breach of warranty without fraud is undoubtedly held to justify the return of the goods; Hyatt v. Boyle, 5 Gill & J. 110; Franklin v. Long, 7 Gill & J. 407; Taymon v. Mitchell, 1 Maryland Chancery 406; Bryant v. Eastburgh, 13 Gray 607; Perley v. Balch, 23 Pick. 283; Dorr v. Fisher, 1 Cush. 274.

It is now pretty generally admitted that breach of warranty can be shown in an action of special assumpsit by the seller to recover the price of the goods in the same way that a breach of the principal contract amounting to a partial failure of consideration can be. In the former case this may not be in strict accordance with common-law rules of pleading, but it is of great advantage in preventing circuity of action. Brantley v. Thomas,

22 Tex. 270; Dukes v. Nelson, 27 Ga. 457; Renaud v. Peck, 2 Hilton 137; Nelson v. Johnson, 25 Mo. 430; Flint v. Lyon, 4 Cal. 17; Muller v. Eno, 4 Kern. 597; Getty v. Roundtree, 2 Chand. 28; Owen v. Sturges, 66 Ill. 366; Murray v. Carlin, 66 Ill. 286; Nichols v. Townsend, 7 Hun. 375; Hitchcock v. Hunt, 28 Conn. 348; Beecker v. Vrooman, 13 Johns. 302; Spalding v. Vandercook, 2 Wend. 431; Burton v. Stewart, 3 Wend. 236; McAllister v. Reab, 4 Wend. 483; Harrington v. Stratton, 22 Pick. 510; Muller v. Smith, 1 Mass. 437; Peden v. Moore, 1 S. & P. 71; Falconer v. Smith, 18 Penn. St. 130; Nichols v. Dusenbury, 2 Conn. 286; Timmons v. Dunn, 4 Ohio St. 680; Guilford v. McKinley, 61 Ga. 230; Ruff v. Jarrett, 94 Ill. 475; Withers v. Green, 9 How. 203.

In North Carolina the courts still hold, in accordance with the earlier common law, that when the plaintiff has so far complied with the contract as to be entitled to recover in *special assumpsit*, the defendant cannot give a breach of warranty or other collateral statement in evidence as a bar, or for the purpose of reducing the damages, but must let judgment go against him for the whole amount and resort to a cross action for indemnity; Hobbs v. Riddick, 5 Jon. 80; McDugal v. McFadgin, 6 Jon. 89.

21. Measure of damages for breach of warranty. — The measure of damages is the difference between the market price of the goods as tendered, and goods complying with the terms of the warranty, without regard to the price that the parties agreed upon; Voorhees v. Earle, 2 Hill 288; Cary v. Gruman, 4 Hill 625; Muller v. Eno, 4 Kern. 597; Sharon v. Mosher, 17 Barb. 518; McGavock v. Wood, 1 Sneed 181; Barton v. Young, 5 Harr. 533; Kierman v. Rocheleau, 6 Bosw. 148; Page v. Parker, 40 N. Y. 147; Carr v. Moore, 41 N. H. 131; Borrekins v. Bevan, 5 Rawle 23; Stiles v. White, 11 Met. 356; Tuttle v. Brown, 4 Gray 459; Tobin v. Post, 3 Cal. 373; Roberts v. Carter, 28 Barb. 462; Woodworth v. Woodburn, 20 Ill. 184; Foster v. Rogers, 27 Ala. 602; Thornton v. Thompson, 4 Gratt. 121; Pritchard v. Fox, 4 Jon. 140; Fish v. Hicks, 11 Foster 535; Woodard v. Thacher, 21 Vt. 580; Prentice v. Dike, 6 Duer 220.

The price, however, is strong *primâ facie* evidence of what the property would be worth if the warranty or representation were true; Blanchard v. Ely, 21 Wend. 342, 348; Cary v. Gruman,

4 Hill 625; Fisk v. Hicks, 11 Foster 535; Thompson v. Burgey, 36 Penn. St. 403, 405; Harvester Works v. Bonnallie, 29 Minn. 373; Morgan v. Ryerson, 20 Ill. 313; Carr v. Moore, 41 N. H. 131.

22. What representations will ground an action on the case for deceit.— It is not enough to show that the defendant asserted that to be true which was, as a matter of fact, false; Tryon v. Whitmarsh, 1 Met. 1; McDonald v. Trafton, 3 Shep. 225; Lord v. Colley, 6 N. H. 99; King v. Eagle Mills, 10 Allen 548; Cowley v. Smyth, 46 N. J. Law 380; Lord v. Goddard, 13 How. 198; Young v. Covell, 8 Johns. 23; Hartford Insurance Co. v. Matthews, 102 Mass. 226.

It must also appear that he was conscious of the falsehood, and made the statement with the intention of deceiving the purchaser; Peers v. Davis, 29 Mo. 184; Meyers v. Conway, 62 Ind. 474.

A fraudulent intention is ordinarily inferred from knowledge that the statements made were false; Stewart v. Sterns, 63 N. H. 105.

The same inference may arise from proof that he had no means of knowledge, and must have known that he was ignorant of what he pretended to know; Hazard v. Erwin, 18 Pick. 95; Atwood v. Wright, 29 Ala. 346; Litchfield v. Hutchinson, 117 Mass. 195; Caldwell v. Henry, 76 Mo. 254; Monroe v. Pritchard, 16 Ala. 785; Bennett v. Judson, 21 N. Y. 228; Sharp v. Mayor of New York, 40 Barb. 257; Indianapolis Railroad Co. v. Tyng, 63 N. Y. 653; Smith v. Newton, 59 Ga. 113; Foard v. Macombe, 12 Bush. 723.

It is not necessary to allege and prove an express and positive misstatement. Any course of dealing calculated to create a false impression amounts to a fraud, and is liable to expose the party guilty of it to an action for damages; Missner v. Granger, 4 Gilm. 69; Laidlaw v. Organ, 2 Wheat. 178; Paddock v. Strobridge, 29 Vt. 470; Schneider v. Heath, 3 Camp. 506; Hadley v. The Clinton County Importing Co., 13 Ohio St. 502; Hansen v. Edgerly, 9 Foster 343.

Fraud has often been held to arise from the suppression of the truth, as, for example, from the sale of provisions for domestic use with the knowledge that they are unsound or unfit for that purpose; Van Bracklin v. Fonda, 12 Johns. 468; Emerson v. Brigham, 10 Mass. 197; Hill v. Gray, 1 Starkey 134;

Bruce v. Ruler, 2 M. & R. 3; Ferebee v. Gordon, 13 Ired. 350; Bean v. Herrick, 12 Me. 263; Patterson v. Kirkland, 34 Miss. 423; Light v. Stoeber's Ex'rs, 12 S. & R. 431; Singleton v. Kennedy, 9 B. Mon. 222; Eaves v. Twitty, 13 Ired. 468; Pearce v. Blackwell, 12 Ired. 429; White v. Miller, 17 N. Y. 118; Schneider v. Heath, 3 Camp. 506; Harley v. The Clinton County Importing Co., 13 O. St. 502; Dixon v. McClutchey, Add. 322; Stevens v. Fuller, 8 N. H. 463; Paddock v. Strobridge, 29 Vt. 471 (an important case); Cardwell v. McClellan, 3 Sneed 150; McAdams v. Cates, 24 Mo. 223; Barron v. Alexander, 27 Mo. 530; Hough v. Evans, 4 McCord 169; Duval v. Medtart, 4 H. & J. 14; Dowing v. Dearborn, 77 Me. 457; Merritt v. Robinson, 35 Ark. 483.

Fraud too may arise from the telling of only part of the truth in such a way as to create the impression that it is the whole truth; Allen v. Addington, 7 Wend. 10; Early v. Garrett, 4 M. & R. 687; Baker v. Seahorn, 1 Sevan. 54; Denny v. Gilman, 26 Me. 149; Gough v. Dennis, Hill & Denio 55; Smith v. Cozart, 2 Head 536.

Where goods are inquired after for a specific purpose, the mere production of them may be equivalent to an affirmation that they are adapted for that purpose. And if a price is demanded such as is usually demanded for a good article, it amounts to a statement of quality, making a seller, knowing, while he does it, of gross defects, liable; Hadley v. Clinton County Importing Co., 13 O. St. 502; Cornelius v. Molloy, 7 Penn. St. 293.

Ordinarily, however, the buyer and seller deal with each other at arm's length, and the latter need state only what he pleases as to the article sold. His omission to disclose facts within his knowledge impairing its value only becomes fraudulent when the nature of the transaction is such as to place him under a moral obligation to make them known. There must at least be a tacit breach of confidence; Egan v. Call, 34 Penn. St. 236; Paul v. Hadley, 23 Barb. 524; Barnett v. Stanton, 2 Ala. 181; Howell v. Cowes, 6 Brun. 393; Kintezing v. McElrath, 5 Penn. St. 467.

It is safe to say that, where the means of information are accessible to both parties, neither is under any obligation to communicate what he has discovered, though he knows the other is ignorant and would not agree to the sale if he knew the

facts; Laidlaw v. Organ, 2 Wheat. 178; Paul v. Hadley, 23 Barb. 521, 524; Hadley v. Clinton Co. Imp. Co., 13 O. St. 502; True v. Roe, 41 Conn. 41; Iron Works v. Moore, 78 Ill. 65; High v. Bacon, 126 Mass. 10; Muhr v. Eagle, 7 Mo. App. 590; Heydecker v. Lombard, 7 Daly 19.

If there is anything to arouse suspicion, or the article is of such a nature that its quality cannot be determined on inspection but would naturally be known to the seller, the buyer is bound to inquire if there are concealed defects; Paul v. Hadley, 23 Barb. 521.

While this rule is the only practical one, its application is difficult and results in conflict. Compare with the case just cited Paddock v. Strobridge, 29 Vt. 476.

There are some decisions which go so far as to lay down the rule that, whatever the nature of the thing sold, if its quality can only be determined by trial, and there is nothing to arouse suspicion, the seller is under an obligation to communicate what he knows as to latent defects. Paddock v. Strobridge, 29 Vt. 476; Cecil v. Tutt, 32 Mo. 462; McAdams v. Cotes, 24 Mo. 225; Barron v. Alexander, 27 Mo. 530; Cardwell v. McClellan, 3 Sneed 150; Cobb v. Fogleman, 1 Ired. 440; Case v. Edney, 4 Ired. 93; Brown v. Gray, 6 Jon. 103.

The falsehood must relate to material facts, and not to mere statements of information, opinion, etc.; Hazard v. Erwin, 18 Pick. 95; Medbury v. Watson, 6 Met. 246; Wardell v. Fosdick, 3 John. 325; Ketletas v. Fleet, 7 John. 324; Oliver v. Sale, Quincy 29; Case v. Hall, 24 Wend. 102; Ward v. Wiman, 17 Wend. 193; Haight v. Hayt, 19 N. Y. 464; Coon v. Atwell, 46 N. H. 510; Somers v. Richards, 46 Vt. 170; Crosland v. Hall, 33 N. J. Eq. 111 (a valuable note by the reporter); Miller v. Barber, 66 N. Y. 558; Manning v. Albee, 11 Allen 320.

There seems to be some doubt whether statements as to how much the vendor paid for the article and how much he has been offered for it are legal frauds. The courts are inclined to be indulgent towards them. Bishop v. Small, 63 Me. 14; Holbrook v. Conner, 60 Me. 578; Hemmer v. Cooper, 8 Allen 334; State v. Paul, 69 Me. 215; Cooper v. Lovering, 106 Mass. 79; Bowen v. Davis, 76 Me. 223; Richardson v. Noble, 77 Me. 392.

They have been held fraudulent in the following cases: Van

Epps v. Harrison, 5 Hill. 63; Page v. Parker, 43 N. H. 369; Sandford v. Handy, 23 Wend. 264; Weidner v. Phillips, 39 Hun. 1.

Whether an expression is a statement of a fact or of an opinion, or a recommendation, is in many cases doubtful and must be left for the jury to decide; Sledge v. Scott, 56 Ala. 202; State v. Tomlin, 29 N. J. Law 13; Bugler v. Flickinger, 55 Penn. St. 279; Bradley v. Luce, 99 Ill. 234; State v. Hefner, 84 N. C. 751; Sharp v. Ponce, 74 Me. 470.

To constitute fraud, the statement must relate to the present and not to the future; Gordon v. Parmelee, 2 Allen 212; Long v. Woodman, 58 Me. 52; Pedrick v. Porter, 5 Allen 324; Mooney v. Miller, 102 Mass. 217.

- 23. False representations by agents. The rule is strictly adhered to that the knowledge or fraud of the agent is the knowledge or fraud of the principal, and the effect is the same whichever makes the representation. Veazie v. Williams, 8 How. 134 (a leading case); Concord Bank v. Gregg, 14 N. H. 331; Jewett v. Carter, 132 Mass. 335 (an important case); Hunter v. Hudson River Co., 20 Barb. 493; Lamm v. Port Deposit Ass'n, 49 Md. 233; Sharp v. Mayor, 40 Barb. 256 (an important case); Chester v. Dickerson, 52 Barb. 350; Presby v. Parker, 56 N. H. 409; Graves v. Spier, 53 Barb. 349; Locke v. Stearns, 1 Met. 560; White v. Sawver, 16 Gray 586; Fitzsimmons v. Joslin, 21 Vt. 139; Jeffrey v. Bigelow, 13 Wend. 518; Bennett v. Judson, 21 N. Y. 239; Griswold v. Haven, 25 N. Y. 595; Ind. R. R. Co. v. Tyng, 63 N. Y. 653; Durst v. Berton, 2 Lans. 137, 47 N. Y. 174; Durant v. Rodgers, 87 Ill. 511; Craig v. Ward, 3 Keyes 387; Ellwell v. Chamberlin, 31 N. Y. 619; Reed v. Peterson, 91 Ill. 297; Tagg v. Tenn. Nat'l Bank, 3 Heisk. 479; Law v. Grant, 37 Wisc. 548; Reynolds v. Wilte, 13 S. C. 5. See article in 3 Am. Law Rev. 430.
- 24. Auction sales. In auction sales the use by the owner or the auctioneer of any unfair means to increase the bid, by which the buyer is misled, is considered fraudulent. For example, the announcement of false bids or use of by-bidders, as well as statements as to the quality of the goods. Veazie v. Williams, 8 How. 134; Conover v. Walling, 15 N. J. Equity 173; Thomas v. Kerr, 3 Bush. 619; Curtis v. Aspinwall, 114 Mass. 187; Monerieff v. Goldsboro, 4 H. & McH. 282: Moorhead v. Hunt, 1 Dev. Eq. 35; Woods v. Hall, 1 Dev. Eq. 411; Walsh

- v. Barton, 24 O. St. 29; Baham v. Bach, 13 La. (O. S.) 287; Pennock's App., 14 Penn. St. 446; Stains v. Shore, 16 Penn. St. 200; Fisher v. Hersey, 17 Hun. 370; Trust v. De La Plaine, 3 E. D. Smith 219; Tomlinson v. Savage, 6 Ired. Eq. 430; Yerkes v. Wilson, 18 Penn St. 9; Donaldson v. McRoy, 1 Browne 346; Peck v. List, 23 W. Va. 338 (a very important case); Nat'l Bank v. Sprague, 20 N. J. Eq. 159.
- 25. The false representation must be relied upon to the buyer's injury.—This is assumed or expressed in all the cases above cited. See also: Allen v. Lee, 1 Curt. 58; Schuyler v. Russ, 2 Cai. Cas. 202; Leland v. Stone, 10 Mass. 459; Nye v. Ia. City Alcohol Works, 51 Ia. 129; McCormick v. Kelly, 28 Minn. 135; Bennett v. Bacon, 76 N. Y. 386.
- 26. Remedies of the buyer for fraudulent representations. 1. First, he may rescind the contract, return the property if he do so promptly, and refuse to pay, or, if he has paid, recover back the amount. Grymes v. Saunders, 93 U. S. 62; Pence v. Langdon, 99 U. S. 578; Jemison v. Woodruff, 34 Ala. 143; Blen v. The Bear River Mo., 20 Cal. 602; Buchenau v. Horney, 12 Ill. 336; Shaw v. Barnhart, 17 Ind. 183; Evans v. Montgomery, 50 Ia. 337; Haran v. Libbey, 36 Me. 357; Perley v. Walch. 23 Pick. 283; 1st Nat'l Bank v. Yocum, 11 Neb. 329; Cook v. Gilman, 34 N. H. 556; Burton v. Stewart, 3 Wend. 236; Parmley v. Adolph, 28 O. St. 10; Leaming v. Wise, 73 Penn. St. 173; Gates v. Bliss, 43 Vt. 299.
- 2. He can keep the property and when sued for the price show the fraud in reduction of the amount claimed; Harrington v. Stratton, 22 Pick. 510; Perley v. Walch, 23 Pick. 283; Westcott v. Nims, 4 Cush. 215; Foulke v. Eckert, 61 Ill. 318; Blith v. Speak, 23 Tex. 429; Godling v. Newell, 12 Ind. 118; Bank of Woodland v. Hyatt, 58 Cal. 234.
- 3. He can keep the property and sue the vendor for the fraud. Miller v. Barber, 66 N. Y. 558; Hubbell v. Meigs, 50 N. Y. 487; Luxon v. Julian, 14 Hun. 252; Krumm v. Beach, 25 Hun. 293.

Of course the vendee cannot get the discount on account of the fraud but once. He cannot sue for damages and also have the purchase price reduced.

4. He can bring a bill in equity to set aside the sale, if for any reason he has not a full remedy at law. Doggett v. Emerson, 3 Story 700; McCulloch v. Scott, 13 B. Mon. 172.

COGGS v. BERNARD (a).

TRINITY - 2 $ANN \not = (b)$.

[REPORTED LORD RAYMOND, 909.]

If a man undertakes to carry goods (c) safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage.

In an action upon the case, the plaintiff declared, quod cum Bernard the defendant, the 10th of November, 13 Will. 3, &c., assumpsisset, salvo et secure elevare, Anglicè to take up several hogsheads of brandy then in a certain cellar in D. et salvo et secure deponere, Anglice to lay them down again in a certain other cellar in Water-lane: the said defendant and his servants and agents, tam negligenter et improvide, put them down again into the said other cellar, quod per defectum curæ ipsius the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, viz. so many gallons of brandy, was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had anything for his pains. And the case being thought to be a case of great consequence. it was this day argued seriatim by the whole court.

⁽a) There is a report of this case, tot. verb., in the Hargrave MSS. No. 66, and 182, therein said "to be transcribed from the MS. Reports of Herbert Jacob, Esq., of the Inner Temple, written with his own hand."

⁽b) S. C., Com. 133; Salk. 26; 3 Salk. 11; Holt. 13; Entry. Salk. 735; Raym. vol. 3, p. 163.

⁽c) Vide Jones on Bailments, 60.

Gould, J. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way; and that any man that undertakes to carry goods is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage; and if a præmium be laid to be given, then it is without question so. The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without anything to be had for his pains, an action will not lie for non-performance, because it is nudum pactum. So is the 3 Hen. 6. 36. So if goods are deposited with a friend, and are stolen from him, no action will lie. 29 Ass. 28. But there will be a difference in that case upon the evidence, how the matter appears: if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action; otherwise, if there be no gross neglect. So is Doct. et Stud. 129, upon that difference. The same difference is, where he comes to goods by finding. Doct. et Stud., ubi supra. Ow. 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is Keilw. 160. 2 Hen. 7. 11. 22 Ass. 41. 1 R. 10. Bro. Action sur le case, 78. Southcote's Case is a hard case indeed, to oblige all men that take goods to keep to a special acceptance that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of; and indeed it appears by the report of that case in Cro. Eliz. 815, that it was adjudged by two judges only, viz. Gawdy and Clench. But in 1 Vent. 121, there is a breach assigned upon a bond conditioned to give a true account that the defendant had not accounted for 301.; the defendant showed that he locked the money up in his master's warehouse, and it was stolen from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he has the goods committed to his custody upon those terms.

Powys, J., agreed upon the neglect.

Powell, J. The doubt is, because it is not mentioned in the

declaration that the defendant had anything for his pains, nor that he was a common porter, which of itself imports a hire and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend, when there is not any particular neglect shown? And I hold, an action will lie, as this case is. And in order to make it out, I shall first show that there are great authorities for me, and none against me; and then, secondly, I shall show the reason and gist of this action; and then, thirdly, I shall consider Southcote's Case.

- 1. Those authorities in the Register, 110, a. b. of the pipe of wine, and the cure of the horse, are in point; and there can be no answer given them, but that they are writs which are framed short. But a writ upon the case must mention everything that is material in the case; and nothing is to be added to it in the count, but the time and such other circumstances. But even that objection is answered by Rast. Entr. 13, c. where there is a declaration so general. The year-books are full in this point, 43 Edw. 3. 33, a. there is no particular act showed; there indeed the weight is laid more upon the neglect than the contract. But in 48 Edw. 3. 6. and 19 Hen. 6. 49. there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 Hen. 7. 11, 7 Hen. 4. 14. these cases are all in point, and the action adjudged to lie upon the undertaking.
- 2. Now to give the reason of these cases, the gist of these actions is the undertaking. The party's special assumpsit and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. (a). So it is 1 Jones, 179 Palm. 548; for the bailee is not bound upon any undertaking against the act of God. Justice Jones, in that case, puts the case of the 22 Ass., where the ferryman overladed the boat. That is no authority, I confess, in that case; for the action there is founded upon the ferryman's act, viz. the overlading the boat. But it would not

⁽a) [See the observations of the court in Taylor v. Caldwell, 3 B. & S. 826; S. C. 32 L. J. Q. B. 164.]

have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have a remedy against the wrongdoers: as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he had taken into his custody upon such an undertaking. An action indeed will not lie for not doing the thing, for want of a sufficient consideration: but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the Countess of Salop. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house he promised to deliver up the house to him again in as good repair as it was then, the (a) action would have lain upon that special undertaking. But there the action was laid generally.

3. Southcote's (b) Case is a strong authority; and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think that a general bailment is an undertaking to keep the goods safely at all events: that is hard. Coke reports the case upon that reason; but makes a difference where a man

⁽a) Vide Com. 627; Burr. 1638.

⁽b) That notion in Southcote's Case, 4 Rep. 83. b. that a general bailment,

and a bailment to be safely kept, is all one, was denied to be law by the whole court, ex relations m'ri Bunbury.

undertakes a case specially, to keep goods as he will keep his own. Let us consider the reason of the case; for nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 Edw. 4. 40. b. there is such an opinion by Danby. The case in 3 Hen. 7. 4. was of a special bailment, so that that case cannot go very far in the matter. 6 Hen. 7. 12, there is such an opinion, by the by. And this is all the foundation of Southcote's Case. But there are cases there cited which are stronger against it, as 10 Hen. 7. 26. 29 Ass. 28. the case of a pawn. My lord Coke would distinguish that case of a pawn from a bailment because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep, 8 Edw. 2. Fitzh. Detinue, 59, the case of goods bailed to a man, locked up in a chest, and stolen; and for the reason of that case, sure it would be hard that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all But then it is answered to that, that the bailee might take them specially. There are many lawyers do not know that difference; or, however it may be with them, half mankind never heard of it. So, for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if (a) a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

Holt, C. J. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely; and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labor, so that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case; and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And (a) there are six sorts of bailments. The first sort (b) of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a depositum, and it is that sort of bailment which is mentioned in Southcote's Case. The second sort is, when goods or chattels that are useful are lent to a friend gratis, to be used by him; and this is called commodatum (c), because the thing is to be restored in specie. The third sort is, when goods are left with the bailee to be used by him for hire; this is called locatio et conductio, and the lender is called locator, and the borrower conductor. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, vadium, and in English, a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust.

As to the (d) first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. He is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is, I confess, a great authority against me; where it is

⁽a) Vide Jones, 35.

⁽b) Just. Inst. lib. 3. tit. 15. text 3.

⁽c) Ibid. text 2. The references to

the Inst. in this case are by Serg.

Hill.
(d) Vide Jones, 36; Depositum 1.

held that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted to keep them only as you will keep your own. But (a) my lord Coke has improved the case in his report of it; for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason or justice, in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him (b). For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But, according to this doctrine, the bailee must answer for the wrongs of other people, which he is not, nor cannot be sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter; and by them show, that there never was any such resolution given before Southcote's Case. The 29 Ass. 28 is the first case in the books upon that learning; and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 Edw. 2 Fitzh. Detinue 59, where goods are locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, it was held that the bailee should not answer for the goods; that case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest: for the bailee has as little power over them when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4. 40. b. was but a debate at bar; for Danby was but a counsel then; though he had been chief justice in the beginning of Edw. 4. yet he was removed, and restored again upon the restitution of Hen. 6. as appears by Dugdale's Chronica Se-

ries. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genny, for his client, said the contrary. The case in 3 Hen. 7.4, is but a sudden opinion; and that by half the court; and yet, that is the only ground for this opinion of my lord Coke, which besides he has improved. But the practice has been always at Guildhall, to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all chief justice Pemberton's time, and ever since, against the opinion of that case. When I read Southcote's Case heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first; and came not to be of this opinion till I had well considered and digested that matter. Though, I must confess, reason is strong against the case, to charge a man for doing such a friendly act for his friend; but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he (a) keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for the keeping them as he keeps his own is an argument of his honesty. A fortiori, he shall not be charged where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3 c. 2. 99. b. 'Is apud quem res deponitur, re obligatur, et de eâ re, quam accepit, restituendâ tenetur, et etiam ad id, si quid in re depositâ dolo commiserit; culpæ autem nomine non tenetur, scilicet desidiæ vel negligentiæ quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare.' As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen, and his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow (b). So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited is, I confess, an old author; but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3. tit. 15. There the law goes further; for

⁽a) Hanise Vinn. p. 605.

⁽b) Sed vide Doorman v. Jenkins, 2 A. & E. 256, post 221, in nota.

there it is said: Ex eo solo tenetur, si quid dolo commiserit: culpæ autem nomine, id est, desidiæ ac negligentiæ, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit, non ei, sed suce facilitati, id imputare debet.' So that such a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words; yet even that would not charge him with all sorts of neglects; for if such a promise were put into writing, it would not charge so far, even then, Hob. 34. a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrongdoers. 3 Cro. 214, acc., 2 Cro. 425, acc., upon a promise for quiet enjoyment. And if a promise will not charge a man against wrongdoers, when put in writing, it is hard it should do it more so when spoken. Doct. and Stud. 130 is in point, that though a bailee do promise to redeliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrongdoer. So that there is neither sufficient reason nor authority to support the opinion in Southcote's Case. If the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect.

As to the second sort of bailment, viz. commodatum, or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods, as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no other wise than he was lent, that accident would not have befallen him. This is mentioned in Bracton, ubi supra: his words are: (a) 'Is autem cui res aliqua

⁽a) This is cited from Bracton, but is in effect the text of Just. Inst. lib. 3, tit. 15, text 2.

utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel prædonum, vel naufragio, amiserit non est dubium quin ad rei restitutionem teneatur,' cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that and steal the horse, he will be chargeable; because the neglect gave the thieves occasion to steal the horse. Bracton says, the bailee must use the utmost care; but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, scilicet locatio, or lending for hire, in this case the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expired. And here again I must recur to my old author, fol. 62, b. (a): 'Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem (b) diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberit, nisi talem adhibuerit de quâ superius dictum est.' From whence it appears, that if goods are let out for a reward, the hirer is bound to the (c) utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he

⁽a) Just. Inst. lib. 3, tit. 26, text 5.

⁽b) Vide Jones, 87.

⁽c) Comm. Vinn. in Just. Inst. lib.

^{3,} tit. 25, text 5, n. 2, 3.

be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the (a) bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, viz. vadium, or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge; and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for (b) the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the (c) pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she (d) might use them. But then she must do it at her peril; for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and, as such, is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then (e) the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompense for the meat. As to the second point, Bracton, 99. b. gives you the answer: - 'Creditor, qui pignus accepit, re obligatur et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratiâ, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis [ei] in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit et rem casu amiserit, securus esse possit nec impedietur creditum petere' (f). In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt.

⁽a) D. acc. post [Ld. Raym.], 1087.

⁽b) S. P. 3 Salk. 268; Holt, 528; Salk. 522.

⁽c) S. P. 3 Salk. 268; Holt, 528; Salk. 522.

⁽d) Ibid. Vide Jones, 80, 81.

⁽e) Ibid. Vide Jones, 80, 81 [Dis-

tress in effect a pledge cannot be used, Bignell v. Clarke, 5 H. & N. 485; S. C., 29; L. J. Exch. 257.]

⁽f) This is also the text of Just. Inst., lib. iii., tit. 14, text 4. De pig-

Agreeable to this is 29 Ass. 28, and Southcote's Case is. But. indeed, the reason given in Southcote's Case is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events; for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c.: which case of a master of a ship was first adjudged, 26 Car. 2, in the case of Mors v. Slue, Raym. 220. 1 Vent. 190, 238. The law charges this person thus entrusted to carry goods against all events, but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law(a), for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in

⁽a) Just. Inst. lib. 4, tit. 5, text 3. Vide Vinn. Comm. in Just. Inst. lib. 3, tit. 27, text 11, n. 2.

that point. The second sort are bailies, factors, and such like. And though a baily is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, &c., it is a good account. And the reason of his being a servant, is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, further than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3. 100, it is called mandatum. It is an obligation which arises ex mandato. It is what we call in English an acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his commentaries upon Justinian, lib. 3. tit. 27. 684, defines mandatum to be contractus quo aliquid gratuito gerendum committitur et accipitur. This undertaking obliges the undertaker to a diligent management. Bracton, ubi supra, says, ' Contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus et mandatis.' I do not find this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are, first, because, in such a case, a neglect is a deceit to the bailor. For, when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 Roll. Abr. 10. 2 Hen. 7. 11. a strong case to this matter. There the case was an action against a man who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if, after, he does not look to them, an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but nudum pactum. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the (a) defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man (b) will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. 6. 49. and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. 4. 33. this difference is clearly put, and that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court what if he had built the house unskilfully? - and it is agreed in that case an action would have lain. There has been a

⁽a) Vide Jones, 56, 57, 61.

question made, If I deliver goods to A., and in consideration thereof he promise to redeliver them, if an action will lie for not redelivering them; and in Yelv. 4. judgment was given that the action would lie. But that judgment was afterwards reversed; and according to that reversal, there was judgment afterwards entered for the defendant in the like case, Yelv. 128. But those cases were grumbled at; and the reversal of that judgment in Yelv. 4. was said by the judges to be a bad resolution; and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667. Tr. 21 Jac. 1. in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of Mors v. Slue was drawn by the greatest drawer in England in that time; and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point; but I do not know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points which wiser heads in time may settle. And judgment was given for the plaintiff.

The case of Coggs v. Bernard is one of the most celebrated ever decided in Westminster Hall, and justly so, since the elaborate judgment of Lord Holt contains the first well ordered exposition of the English law of bailments. The point which the decision directly involves, viz. that if a man undertake to carry goods safely, he is responsible for damage sustained by them in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage, is now clear law, and forms part of a general proposition in the law of principal and agent, which may be stated in the following words, viz.—The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. See Shillibeer v. Glynn, 2 M. & W. 143; Whitchead v. Greetham, 2 Bing. 464. And this proposition includes cases stronger than that reported in the text. For there Bernard had undertaken to lay the goods down safely, whereby he introduced a

special term into his contract; for it will be seen from the judgments, particularly Lord Holt's, that notwithstanding what was said by Lord Coke in Southcote's Case, there is a difference between the effect of a gratuitous undertaking to keep or carry goods, and a gratuitous undertaking to keep or carry them safely.

The distinction ought, however, to be observed between actual insurance of safety of the goods, and a contract to take due care for their safety. The latter seems to include an obligation to carry safely; Collett v. London and N. W. Rail. Co., 16 Q. B. 984 [see Blake v. The G. W. Rail. Co., 7 H. & N. 987; 31 L. J. Exch. 346].

But, under the rule just laid down, a gratuitous and voluntary agent who has given no special undertaking, though the degree of his responsibility is greatly inferior to that of a hired agent, is yet bound not to be guilty of gross negligence. This proposition is affirmed by several recent cases. In Wilkinson v. Coverdale, 1 Esp. 74, it was alleged that the defendant had undertaken gratuitously to get a fire policy renewed for the plaintiff, but had, in doing so, neglected certain formalities, the omission of which rendered the policy inoperative. Upon its being doubted at Nisi Prius whether an action would lie under these circumstances, Erskine cited a MS. note of Mr. Justice Buller in Wallace v. Telfair, wherein that judge had ruled, under similar circumstances, that, though there was no consideration for one party's undertaking to procure an insurance for another, yet, where a party voluntarily undertook to do it, and proceeded to carry his undertaking into effect by getting a policy underwritten, but did it so negligently or unskilfully that the party could derive no benefit from it, in that case he should be liable to an action; in which distinction Lord Kenyon acquiesced. So in Beauchamp v. Powley, 1 M. & Rob. 38, where the defendant, a stage-coachman, received a parcel to carry gratis, and it was lost upon the road, Lord Tenterden directed the jury to consider whether there was great negligence on the part of the defendant, and the jury, thinking that there was, found a verdict against him. So too in Doorman v. Jenkins, 2 A. & E. 256, in assumpsit against the defendant, as bailee of money entrusted to him to keep without reward, it was proved that he had given the following account of its loss, viz. that he was a coffee-house keeper, and had placed the money in his cashbox in the tap-room, which had a bar in it, and was open on Sunday, though the other parts of his house were not, and out of which the cash-box was stolen upon a Sunday. The Lord Chief Justice told the jury that it did not follow, from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and he added, that that fact afforded no answer to the action, if they believed that the loss occurred from gross negligence. The jury having found a verdict for the plaintiff, the court refused to set it aside.

[In Giblin v. M'Mullen, L. R. 2 P. C. 317, 38 L. J. P. C. 25, the plaintiff, a customer, had deposited with the defendant's bank a strong box containing securities, himself retaining the key. The box was placed in the strong room where the securities of the bank were kept, and to which the cashier of the bank had access. The bank received nothing for keeping the box. Some debentures were abstracted from the box by the cashier, who absconded, and the plaintiff having obtained a verdict in an action against the bank, a rule was subsequently made absolute for a non-suit in the Colonial Court on the ground that there was no evidence of gross negligence, for which alone the bank as gratuitous bailees could be held liable. This decision was upheld by the Privy Council on appeal.]

It is clear from the above decisions, that a gratuitous bailee or other agent is chargeable when he has been guilty of gross negligence; and it is equally clear both from the words of the judges in several of the above-cited cases, and also from express decisions, that for no other kind of negligence will be liable, except in the single case which shall by and by be specified. In Doorman v. Jenkins, Patteson, J., says: "It is agreed on all hands that the defendant is not liable, unless he has been guilty of gross negligence." "The counsel," says Taunton, J., "properly admitted, that as this bailment was for the benefit of the bailor, and no remuneration was given to the bailee, the action could not be maintainable except in the case of gross negligence." In Shiells v. Blackburne, 1 H. Bl. 158, the defendant having received orders from his correspondent in Madeira to send a quantity of cut leather thither, employed Goodwin to execute the order. Goodwin accordingly prepared it, and sent it, along with a case of leather of the same description belonging to himself, to the defendant, who, to save the expense of two entries, voluntarily and without compensation, by agreement with Goodwin, made one entry of both cases, but entered them by mistake as wrought leather, instead of dressed leather, in consequence of which mistake the cases were both seized; and an action having been brought by the assignees of Goodwin, who had become bankrupt, against the defendant, to recover compensation for the loss, the general issue was pleaded, and there was a verdict for the plaintiff, which the court set aside, and granted a new trial, upon the ground that the defendant was not guilty either of gross negligence or fraud. This case was much remarked upon in Doorman v. Jenkins, which it resembled in the circumstance that the bailee in each case lost property of his own along with that which had been entrusted to him. "The case of Shiells v. Blackburne," says Taunton, J., "created at first some degree of doubt in our minds. It was said that the court in that case treated the question as a matter of law, and set aside the verdict, because the thing charged, viz. the false description of the leather in the entry, did not amount to gross negligence, and therefore the jury had mistaken the law. I do not view the case in that light. The jury there found that in fact the defendant had been guilty of negligence, but the court thought they had drawn a wrong conclusion as to that fact." In Darthall v. Howard, 4 B. & C. 345, the declaration stated, that in consideration that the plaintiff, at the request of the defendants, would employ them to lay out 1,400l. in purchasing an annuity, the defendants promised to perform and fulfil their duty in the premises, and that they did not perform or fulfil their duty, but, on the contrary, laid out the money in the purchase of an annuity on the personal security of H. M. Goold and Lord Athenry, who were both in insolvent The court, after verdict, arrested the judgment upon the circumstances. ground that the defendants appeared to be gratuitous agents, and it was not averred that they had acted either with negligence or dishonesty. See also Bourne v. Diggles, 2 Chitt. 311; Moore v. Mogue, Cowp. 480 [and Chanter v. Money, 12 Ir. C. L. 161].

From the two classes of cases just enumerated, it is plain that an unpaid agent is liable for gross negligence, and equally plain that he is liable for nothing less. From the latter of these propositions there is, however, as has been already stated, one exception, and it is contained in the following words of Lord Loughborough, when delivering judgment in Shiells v. Blackburne:—"I agree," said his lordship, "with Sir William Jones, that when a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, then the bailee is only liable for gross negligence. But if a man gratuitously undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him

as gross negligence. If, in this case, a ship-broker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries."

It perhaps may be more correct to call this a distinction engrafted on the general doctrine, than an exception from it; since it does not render any unpaid agent liable for less than gross negligence; but renders that gross negligence, in some agents, which would not be so in others. See Wyld v. Pickford, 8 M. & W. 443 [Harmer v. Cornelius, 5 C. B. N. S. 246]; and Wilson v. Brett, 11 M. & W. 113, where it was laid down that an unpaid agent is bound to use such skill as he is shown to possess, and is guilty of culpable negligence if he do not. And Rolfe, B., in that case said, that there is no difference between negligence and gross negligence, that it is the same thing, with the addition of a vituperative epithet. [See Hinton v. Dibbin, 2 Q. B., per Lord Denman, p. 661,] Also. in Austin v. Manchester, &c., Railway Co., 10 C. B. 454, it was said, the phrase gross negligence is "more correctly used in describing the sort of negligence for which a gratuitous bailee is responsible." See Pothier, Contrat de Dépôt, cap. 2, art. 1, s. 72. ["There is a certain degree of negligence," said Pollock, C. B., in Beal v. The S. Devon Rail. Co., 5 H. & N. 881, "to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them," The distinction may be between simple negligence and negligence in spite of the better skill or knowledge which the bailee actually had, or undertook to have. "In the case of a carrier or other agent holding himself out for the careful and skilful performance of a particular duty, gross negligence includes the want of that reasonable care, skill, and expedition, which may properly be expected from persons so holding themselves out and their servants. The authorities are numerous, and the language of the judgments various, but for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence is gross negligence. What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence such as are exercised in the ordinary and proper course of similar business, and such skill as he ought to have, namely, the skill usual and requisite in the business for which he receives payment." Beal v. S. Devon Rail. Co., 3 H. & C. 337. And see per Willes, J., Grill v. General Iron Screw Colliery Co., L. R. 1 C. P. 600; 35 L. J. C. P. 321; Moffatt v. Bateman, L. R. 3 P. C. 115.

In Giblin v. McMullen, above cited, Lord Chelmsford took exception to the proposition that gross negligence is only negligence with a vituperative epithet, saying that from the time of Lord Holt's judgment in the principal case down to the present day this term had been used without objection as a short and convenient mode of describing the degree of responsibility which attaches upon a gratuitous bailee. See, however, Campbell's Law of Negligence, p. 11, and per Willes, J., in Oppenheim v. White Lion Hotel Company, L. R. 6 C. P., at p. 521; Cashill v. Wright, 6 E. & B. 891, per Erle, J.

In Giblin v. McMullen, and the parallel American case therein referred to, it was considered that the bank were gratuitous bailees of the securities deposited with them, but this assumption is perhaps open to question, for as in some cases the carrier has been held liable as bailee for reward of goods warehoused by him after the transit was complete, the warehousing being accessory to the contract of carriage; see Cairns v. Robins, 8 M. & W. 258; so it might be argued

that the keeping of securities deposited by his customers is accessory to the general business of a banker, so as to make him a bailee for reward in respect of them. In the case of *The United Service Company, Johnson's Claim*, L. R. 6 Ch. 212, 40 L. J. Ch. 286, the Lords Justices, affirming a decision of the Master of the Rolls, distinguished *Giblin v. McMullen*, and held that the bank were bailees for reward of railway certificates deposited with them by a customer, on which they collected the dividends, charging a small commission for so doing.]

The case of *Coggs* v. *Bernard* derives most of its celebrity from the elaborate dissertation upon the general law of *Bailments* delivered by Lord Holt in pronouncing judgment. His lordship, as we have seen, distributes all *Bailments* into the following six classes, viz.:—

- Depositum; or a naked bailment of goods, to be kept for the use of the bailor.
- 2. Commodatum. Where goods or chattels that are useful are lent to the bailee gratis, to be used by him.
- Locatio rei. Where goods are lent to the bailee, to be used by him for hire.
- 4. Vadium. Pawn.
- Locatio operis faciendi. Where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee.
- 6. Mandatum. A delivery of goods to somebody, who is to carry them, or do something about them, gratis.

Sir William Jones, in his Treatise on Bailments, objects to this division; "for," says he, "in truth his fifth sort is no more than a branch of the third, and he might with equal reason have added a seventh, since the fifth is capable of another subdivision." The fifth of the classes enumerated by Lord Holt is, as we have seen, Locatio operis faciendi, i. e. where goods are delivered to be carried, or something is to be done about them, for reward to be paid to the bailee. And this, with due submission to so great an authority as Sir William Jones, cannot be reasonably treated as a branch of the third, which is Locatio rei, i. e. where goods are lent to the bailee, to be used by him for hire; for there exists between them this essential difference, riz. that in cases falling under the third class, or locatio rei, the reward is paid by the bailee to the bailor; whereas in cases falling under the fifth class, or locatio operis faciendi, the reward is always paid by the bailor to the bailee. It is true that in Latin both classes are described by the word locatio, which probably gave rise to Sir William Jones's opinion that both ought to be included under the same head; but then in the third class, locatio rei, the word locatio is used to describe a mode of bailment, riz. by the hiring of the thing bailed; whereas in the fifth class, locatio operis faciendi, the same word locatio is used, not to describe any mode of bailment, but to signify the hiring of the man's labor who is to work upon the thing bailed; for as to the thing bailed, that is not hired at all, as it is in cases falling within the third class. If, indeed, Lord Holt had been enumerating the different sorts of hirings, not of bailments, he would, no doubt, like the civilians, have classified both locatio rei and locatio openis under the word hiring, since in one case goods are hired, and in the other labor. But he was making a classification, not of hirings, but of bailments; and since in cases of locatio rei there is a hiring of the thing bailed, and in cases of locatio operis no hiring of the thing bailed, it was impossible to place, with any degree of propriety, two sorts of bailment under the same class, one of which is, and the other of which is not, a bailment by way of hiring. As to the objection that Lord Holt's fifth class of bailments is capable of another subdivision, there is no

doubt but that it may be split, not only as Sir W. Jones suggests, into locatio operis faciendi, where work is to be done upon the goods, and locatio operis mercium vehendarum, where they are to be carried, but into as many different subdivisions as there are different modes of employing labor upon goods; and, in point of fact, the civilians, in their division of hirings, enumerated another class, viz. locatio custodiæ, or the hiring of care to be bestowed in guarding a thing bailed, which is omitted by Sir W. Jones. For these reasons, it is submitted that Lord Holt's classification is the correct one, and it remains to make a few remarks on each of the six classes enumerated by him.

1st. With respect to Depositum, which it will be recollected is a bailment without reward, in order that the bailee may keep the goods for the bailor, the law respecting the bailee's responsibility may be summed up in the words in which Lord Holt concludes his observations on that head of bailment, viz. "if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect." An important modern case respecting deposit has been already cited in this note, viz. Doorman v. Jenkins, 2 A. & E. 256, where, as has been stated, the question whether there had been gross negligence was left to the jury. There are some expressions in this part of Lord Holt's judgment, from which a superficial reader might infer that his lordship thought that a depositary would always be secure, provided that he kept the goods deposited with as much care as his own; but on looking attentively at the whole context, it appears that his lordship considered the bailee's keeping the goods bailed as he keeps his own, rather as an argument against the supposition that gross negligence has been committed, than as any substantive ground of discharge. "The keeping them," says his lordship, "as he kept his own is an argument of his honesty;" and consequently an argument against the supposition of gross negligence, for Lord Holt considered gross negligence almost the same thing with dishonesty. "If," says he, "there be such gross neglect, it is looked upon as evidence of fraud." And it is quite clear, especially from Doorman v. Jenkins, that gross negligence may be committed by a depositary, although he may have kept the property entrusted to him with as much care as his own; and that if it be, his negligence of his own goods is no defence. |See Giblin v. McMullen, ubi sup., where the same doctrine was applied.] See also Rooth v. Wilson, 1 B. & A. 59. On the other hand, it is also clear that a depositary is not liable for anything short of gross negligence; and though Lord Coke in Southcote's Case, 4 Rep. 83, b., 1 Inst. 89, a. b., expressed an opinion that a depositary is responsible if the goods are stolen from him, unless he accepts them specially to keep as his own, that doctrine has been completely overthrown by Lord Holt in the principal case. How far a depositary may add to his responsibility by inserting special terms in his promise to his bailor, is a point not by any means clearly settled. See Kettle v. Bromsall, Willes, 118, and the observations of Sir William Jones on Southcote's Case; Jones on Bailments, 42, 3; and of Mr. J. Powell in the principal case.

A depositary has no right to use the thing entrusted to him. Bac. Abr. Bailment D.; Clarke v. Gilbert, 2 Bing. N. C. 343. Where a man finds goods belonging to another, he seems bound, after he has taken them into his possession, to the same degree of care with a depositary. See Isaac v. Clarke, 2 Bulst. 306, 312; 1 Rolle [59, 126]; Doct. & St. Di. 2, c. 38; sed vide Bac. Abr. Bailment, D. [and see 27 Hen. 8, fol. 13, pl. 35. He is guilty of larceny if he appropriates the goods to his own use, having intended so to do when he took possession of them, and having then known, or had reasonable grounds for believing that the owner could be discovered. See the cases cited in R. v. Christopher, 28 L. J. M. C. 35; and R. v. Moore, 30 L. J. M. C. 77].

2dly. As to Commodatum or loan the responsibility of the bailee is much more strictly enforced in this class of bailments; and that with justice, for the loan to him is for his own advantage,—not, as in the case of deposit, for that of the bailor. Besides he may justly be considered as representing himself to the bailor to be a person of competent skill to take care of the thing lent. See Wilson v. Brett, 11 M. & W. 115, per Parke, B. He is, therefore, bound to use great diligence in the protection of the thing bailed, and will be responsible even for slight negligence; nor must he on any account deviate from the conditions of the loan, as in Bringloe v. Morrice, 1 Mod. 210, 3 Salk. 271, where the loan of a horse to the defendant to ride was held not to warrant him in allowing his servants to do so. But where a horse was for sale, and the agent of the vendor let A. have the horse for the purpose of trying it, A. was held justified in putting a competent person upon the horse to try it, an authority to do so being implied. Lord Camoys v. Scurr, 9 Car. & P. 383.

3dly. Locatio rei. This, as we have seen, is where goods are lent to the bailee for hire. In such case, Lord Holt tells us that the bailee is bound to use the utmost care. This expression, as Sir William Jones has remarked, appears too strong, for it would place a hirer who pays for the use of the goods on the same footing as a borrower; and indeed Lord Holt himself qualifies it, by citing, immediately after, a passage of Bracton, in which the care required is described to be "talis qualis diligentissimus paterfamilias suis rebus adhibet." Sir William has, in an able criticism upon this passage, shown that it was copied verbatim from Justinian, in whose work he further proves, that it must have been used to signify, not extreme, but ordinary diligence. Accordingly, in Dean v. Keate, 3 Camp. 4, the diligence required from the hirer of a horse was such as a prudent man would have exercised towards his own, and therefore, having himself prescribed to it, instead of calling in a veterinary surgeon, he was held responsible. See the notes to that case, and Dary v. Chamberlain, 4 Esp. 229; see also Reading v. Menham, 1 M. & Rob. 234, and Longman v. Gallini, Abbott on Shipp. [11th Ed., 343, n.] This species of bailment is determined by a wrongful sale of the goods, and the owner may at once maintain an action of trover against even a bouû fide purchaser, Cooper v. Willomatt, 1 C. B. 672 [and see Fenn v. Bittlestone, 7 Exch. 152. So where a vendee of sheep, which he had bought upon credit, left them for his own purposes in the hands of the vendor, who, without default on the part of the vendee, resold them before the credit had expired, he was allowed to maintain trover against the vendor. Chinery v. Vial, 5 H. & N. 288. No doubt in such case the unpaid vendor's liability for the conversion would be the same to whatever class of bailee he may be considered as belonging].

4thly. Vadium or pawn. In this case also the pawnee is bound to use ordinary diligence in the care and safeguard of the pawn, but he is not bound to use more; and therefore, if it be lost notwithstanding such diligence, he shall still resort to the pawner for his debt. See Lord Holt's judgment in the text; Vere v. Smith, 1 Vent. 121; Anon., 2 Salk. 522 [Syred v. Carruthers, E. B. & E. 469]. So, too, if several things be pledged for the same debt, and one be lost without default in the pawnee, the residue are liable to the whole debt. Ratcliffe v. Davies, Yel. 178; Bac. Abr. Bailment, B. If the pawner make default in payment at the stipulated time, the pawnee has a right to sell the pledge, and this he may do of his own accord, without any previous application to a court of equity. See Pothonier v. Dawson, Holt, 385; Tucker v. Wilson, 1 P. Wms. 261; Lockwood v. Ewer, 9 Mod. 278; 2 Atk. 303 [per curiam, in Pigot v. Chubley, 15 C. B. N. S. 701; and the observations of Williams, J., and Willes, J., in Martin v. Read, 11 C. B. N. S. 730; 31 L. J. C. P. 126, and of Bowen, L.

J., in Burdick v. Sewell, 13 Q. B. D. 174]; or he may sue the pawnor for his debt, retaining the pawn, for it is a mere collateral security. Bac. Abr. Bailm. B.; Anon., 12 Mod. 564. [And it has been said that if there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to insist upon a prompt fulfilment of the engagement; and if the pawnor neglects or refuses to comply, the pawnee may, upon due demand and notice to the pawnor, require the pawn to be sold. Story on Bailments, 6th Ed., s. 309, p. 281, citing 2 Kent. Comm., pp. 581, 582. It seems that, according to the civil law, in cases where the time of payment was fixed, an express agreement for the sale (or distress) of the pawn on default was not necessary to entitle the pawnee to sell immediately on default. Macheldeii Systema Juris Romani, lib. 1, cap. 6, s. 317, p. 325; and the authorities there cited; Warnkænig Comm., vol. 1, p. 516; and Œuvres de Pothier, par Bugnet, vol. 5, 392; vol. 9, 484.] If he think proper to sell, the surplus of the produce, after satisfying the debt, belongs to the pawnor; while, on the other hand, if the pawn sell for less than the amount of the debt, the deficiency continues chargeable on the pawnor. South Sea Co. v. Duncombe, 2 Str. 919.

From all this it will be seen that a pawn differs, on the one hand, from a lien, which conveys no right to sell whatever, but only a right to retain until the debt in respect of which the lien was created has been satisfied [see Thames Ironworks Co. v. Patent Derrick Co., 1 Johns. & H. 93; 6 Jur. N. S. 1013; 29 L. J. Ch. 714; Mulliner v. Florence, 3 Q. B. D. 484]; and on the other hand, from a mortgage, which conveys the entire property of the thing mortgaged to the mortgagee conditionally, so that when the condition is broken the property remains absolutely in the mortgagee; whereas a pawn never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor is, not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus, which power, if he neglect to use, the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it. Com. Dig. Mortgage, B.; Walter v. Smith, 5 B. & A. 439; Kemp v. Westbrook, 1 Ves. 278; Demandray v. Metcalfe, Prec. Cha. 420; 2 Vern. 691; Vanderzee v. Willis, 3 Bro. 21; Ratcliffe v. Davies, Yelv. 178 [R. v. Morrison, 28 L. J. M. C. 210; Maugham v. Sharpe, 17 C. B. N. S. 443, 34 L. J. C. P. 19; Sewell v. Burdick, 10 App. Cas. 74; 54 L. J. Q. B. 156].

There is a passage in the judgment of the Court of Common Pleas in Clarke v. Gilbert, 2 Bing. N. C. 356, which, at first sight, seems opposed to the doctrine above laid down as to the sale of a pledge, but which, on consideration of the nature of the article pledged in that case, will be found quite consistent with the proposition that the simple pledge of a mere chattel gives a right of sale on default. In that case a lease had been pledged to a solicitor for the amount of his bill of costs. The client became bankrupt, and the solicitor, with the concurrence of the assignees, sold the lease, and received his bill of costs out of the proceeds. The commission was superseded for default of the petitioning creditor's debt, and a fresh commission issued, under which the plaintiffs were appointed assignees. They were held entitled to recover against the solicitor the amounts which he had received. Tindal, C. J., in delivering judgment, said, "It appears that they were part of the proceeds arising from the sale of a lease belonging to the bankrupt. Now that lease at the time of such sale was in the possession of the defendant, as a pledge or security for the payment of his demand against the bankrupt, being either in his possession as solicitor, under a claim upon it for his lien which the law gives him, or having been expressly deposited with him as a security for his demand according to the evidence of

Stevens. In either case the right and power of the defendant over the lease was precisely the same; he had the right to retain the lease in his possession until his demand was paid, and so far by means of the possession of the lease to enforce payment of his demand, but he had that right only; he had no right to sell the lease and to pay himself his demand out of the proceeds. So long as the lease remained in his possession, neither the bankrupt nor his assignee could retake it without either payment of the demand or a tender and refusal, which is equivalent to payment. But if instead of keeping the thing pledged he sells it, or enables any other person to sell it, by concurring in the sale, he is guilty of a direct conversion, and makes himself liable for the value of the lease in an action of trover."

It is conceived that the above passage is not to be considered as propounding generally that a chattel pledged cannot be sold in default of payment, and that it must be confined to the case under discussion, of a pledge of a lease or other title deed which gives the pledgee an equitable mortgage upon the land with a certain known legal remedy by sale under the decree of a Court of Equity, a remedy inconsistent with his parting with the possession of the deed only, for which, without the land, but little could be obtained, whilst great damage could be inflicted on the pledgor by putting his title deed in peril [see Shillito v. Hobson, 30 Ch. D. 396].

After the debt has been discharged or tendered, it of course becomes the pawnee's duty to return the pawn. See the text: Isaac v. Clarke, 2 Bulst. 306; Anon. 2 Salk. 522, B. N. P. 72. And if the pawnor had, as he might have done, assigned his property in the pledge, subject to the pawnee's rights and special property, the assignee [would even before the Judicature Act have had], it was said, the same right as the pawnor, both in law and equity; Kemp v. Westbrook, 1 Ves. 278; Franklin v. Neate, 13 M. & W. 481; whereas it is clear that the assignee of the equity of redemption in a thing mortgaged could have [had] no rights at law. A mere pledge of chattels personal is therefore not, properly speaking, a mortgage, and, though in writing, need not bear a mortgage stamp. Harris v. Birch, 9 M. & W. 592. There may, however, be a mortgage, properly speaking, of chattels, which will be subject to the same incidents as any other mortgage. And such mortgage may be made without deed. Flory v. Denny, 7 Exch. 581. [As to the effect of a mortgage of a ship, see Kitchen v. Irvine, 28 L. J. Q. B. 46.] If the pawnee, after payment or tender, insist upon retaining the goods pledged, he is a wrongdoer, and becomes liable to an action, and chargeable with any damage which may afterwards happen to the pledge, whether with or without his default. See the text, Lord Holt's judgment: Anon. 2 Salk. 522; Com. D. Mortg. B. It is competent for a pawnee to set up the right of a third person to the thing pledged, subject of course to the burden of proof. Cheeseman v. Exall, 6 Exch. 341 [so may a bailee of any class. Biddle v. Bond, 34 L. J. Q. B. 137, 6 B. & S. 225; Sheridan v. New Quay Co., 4 C. B. N. S. 618].

A pawn being a sort of bailment, transfer of the possession [(actual or constructive, Meyerstein v. Barber, L. R. 2 C. P. 51, 36 L. J. C. P. 57, per Willes, J.; Young v. Lambert, L. R. 3 P. C. 142)] of the chattel pledged is of the essence of it; and if the pawnee part with the possession, he loses the benefit of his security, Ryal v. Rolle, 1 Atk. 164; approved of in Reeves v. Capper, 5 Bing. N. C. 140, 141. [That is to say, if such parting with possession amount to a total renunciation of the contract of pledge, for otherwise the pawnee, though he has repledged or even sold the pawn, retains the right to be recouped his original advance. Johnson v. Stear, 15 C. B. N. S. 331, 33 L. J. C. P. 130; Donald v. Suckling, L. R. 1 Q. B. 585, 35 L. J. Q. B. 232; Halliday v. Holyate, L. R.

3 Exch. (Cam. Scace.) 299, 37 L. J. Exch. 174. And accordingly in estimating the damages in an action of conversion at the suit of the pawnor against a pawnee who had sold the pawn before the day for payment had arrived, the court held, dissentiente Williams, J., that the pawnee might deduct the amount of his original advance. Johnson v. Stear, ubi sup.; a right which does not exist for a defendant sued for the conversion of a chattel on which he had merely a lien, see Mulliner v. Florence, 3 Q. B. D. 484, where the cases above cited are discussed. Nor unless such sale or repledge is so inconsistent with the contract of pawn as to amount to a renunciation of it, does it revest in the pawnor the general property in the pledge, so as to enable him to maintain an action of detinue or conversion. Donald v. Suckling and Halliday v. Holgate, ubi sup. And see the comments of Blackburn, J., in the former case, upon the form of action in Johnson v. Stear. The proper remedy of the pawnor is by an action upon the case for the injury done to his legal right.

The law upon this subject is thus summarized by Willes, J., in delivering the judgment of the Exchequer Chamber in Halliday v. Holgate: "There are three kinds of security, the first a simple lien; the second a mortgage passing the property out and out; the third, a security intermediate between a lien and a mortgage, viz. a pledge, where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgor has no present interest. If the pledgee deals with it in a manner other than is allowed by law for the payment of his debt, then in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act" (i. e. a sale without demand, and without notice upon the bankruptcy of the pledgor of scrip certificates pledged with him) "to revest in the pledger the immediate interest or right in the pledge which by the bargain is out of the pledgor and in the pledgee. Therefore for any such wrong an action of trover or of detinue, each of which assumes an immediate right to possession in the plaintiff, is not maintainable, for that right clearly is not in the plaintiff." So, if the pawnee, after the pawn has taken place, redeliver the chattel to the pawnor for some purpose consistent with the continuance of the contract of pledge, the possession of it by the pawnor is looked upon as the possession of the pawnee, and the security remains. Reeves v. Capper, 5 Bing. N. C. 140 and Martin v. Reed, 11 C. B. N. S. 730, where the goods were left on the pawnor's premises].

[On the subject of pawnbrokers, see 35 and 36 Vict. c. 93, which repeals former enactments, and now governs this branch of the law. Sections 5 and 6 define who is a pawnbroker. This act applies only to loans not exceeding 10l., leaving loans of larger amount subject to the ordinary law (see *Pennell v. Attenborough*, 4 Q. B. 868, decided upon the old law), and contains provisions guarding against the facility of putting away stolen goods.

Pledges may be redeemed within twelve months from the day of pawning, exclusive of that day, and seven days of grace are allowed in addition. Pledges for amounts of 10s. or under become the absolute property of the pawnbroker, if not redeemed within that time; but by s. 18, pledges for larger amounts remain, as at common law, redeemable until sale; see Waller v. Smith, 5 B. & A. 430, which must be by public auction.

In cases, however, where the loan is above 40s, the pledge may be made upon the terms of a special contract.

S. 25, which provides for the delivery back of the pledge to the holders of the pawn-ticket, does not protect the pawnbroker against a person claiming by title paramount to that of the pawnor: Singer, &c., Co. v. Clark, 5 Ex. D. 37; 49 L. J. Ex. 224.

Under the former enactments it had been held that a pawnbroker was not liable for damage to the goods by fire, unless it were proved that the fire took place through his default, neglect, or wilful misbehavior; Syred v. Carruthers, E. B. & E. 469; 27 L. J. M. C. 273; but by s. 27 of the present act, an absolute liability is imposed upon the pawnbroker to make good, subject to certain deductions, the value, to be ascertained as therein directed, of pledges damaged or destroyed by fire; and he is by the same section empowered to insure to the extent of such value.

By s. 28, courts of summary jurisdiction may award a reasonable satisfaction to owners of pledges in respect of depreciation arising by the default, neglect, or wilful misbehavior of the pawnbroker.

In a case decided under the former law, where the goods were stolen in a burglary on the pawnbroker's premises, it was considered that he had been guilty of neglect in leaving the premises without any one in them for twenty-four hours. Shackell v. West, 2 E. & E. 326. A duplicate is a subject of larceny. R. v. Morrison, 28 L. J. M. C. 210.]

5thly. Locatio operis faciendi. In this case, goods are entrusted by the bailor to the bailee, to be safely kept, or to be carried, or to have some work done upon them, for hire, to be paid to the bailee. Such is the bailment of goods to a warehouseman or wharfinger, to be taken care of, or cloth to a tailor, to be made into a garment, of jewels to a goldsmith to be set, of a seal to a stone-cutter to be engraved, &c. In such cases the rule is, that the bailee is bound not only to perform his contract with regard to the work to be done, but also to use ordinary diligence in the care and preservation of the property entrusted to him. Vide Best v. Yates, 1 Vent. 268. Thus, if a watch be left with a watchmaker for repairs, he must use ordinary care about its safeguard. If he use less, and the watch be lost, he is chargeable with its value. Clarke v. Ernshaw, 1 Gow. 30. So a wharfinger who takes upon him the mooring and stationing of the vessels at his wharf, is liable for any accident occasioned by his negligent mooring, Wood v. Curling, 15 M. & W. 626, 16 M. & W. 628. So if cattle be agisted, and the agistor leave the gates of his field open, he uses less than ordinary diligence; and if the cattle stray out and are stolen, he must make good the loss. Broadwater v. Blot, Holt, 547 [per Byles, J., Marfell v. S. Wales Rail. Co., 8 C. B. N. S. 525; Smith v. Cook, 1 Q. B. D. 79; 45 L. J. Q. B. 122].

If an uncommon or unexpected danger arise, he must use efforts proportioned to the emergency to ward it off. In Leck v. Maestaer, 1 Camp. 138, the defendant was the proprietor of a dry dock, the gates of which were burst open by an uncommonly high tide, and the plaintiff's ship, which was lying there, forced against another ship and injured. It was sworn, that with a sufficient number of hands the gates might have been shored up in time so as to bear the pressure of the water; and, though the defendant offered to prove that they were in a perfectly sound state. Lord Ellenborough held that it was his duty to have had a sufficient number of men in the dock to take measures of precaution when the danger was approaching, and that he was clearly answerable for the effects of the deficiency. So a warehouseman, who is a bailee of this description, does not use ordinary diligence about the goods entrusted to him, if he

have not his tackle in proper order to crane them into the warehouse, whereby they fall and are injured. Thomas v. Day, 4 Esp. 262. But he is not liable for loss by a mere accident, not resulting from his negligence. Garside v. Trent Nav. Co., 4 T. R. 581; see Hyde v. Trent Nav. Co., 5 T. R. 389: In re Webb, 8 Taunt. 443; Vere v. Smith, 1 Vent. 121. [Searle v. Laverick, L. R. 9 Q. B. 122, 43 L. J. Q. B. 43.] Yet, in case of a loss, the onus is on the bailee to prove that it occurred through no want of ordinary care on his part. Mackenzie v. Cox, 9 Car. & P. 632 [Reeve v. Palmer, 5 C. B. N. S. 84, where an attorney was held liable in detinue for losing his client's deed, it not being shown how the loss occurred.]

There are, however, two cases in which the liability of bailees falling within this class is extended very much beyond the limit above pointed out, viz. where the bailee is an innkeeper or a common carrier. The extent of the innkeeper's liability has already been discussed in the notes to Calye's Case, the leading authority on that subject. A few words shall be now devoted to that of the carrier.

A common carrier is a person who undertakes to transport from place to place, for hire, the goods of such persons as think fit to employ him. Such is a proprietor of wagons, barges, lighters, merchant-ships, or other instruments for the public conveyance of goods. See the text: Forward v. Pittard, 1 T. R. 27; Mors v. Slue, 2 Lev. 69; 1 Vent. 190, 238, commented on in the text by Lord Holt; Rich v. Kneeland, Cro. Jac. 330; Maving v. Todd, 1 Stark. 72; Brook v. Pickwick, 4 Bing. 218; Ingate v. Christie, 3 Car. & K. 61; though one of the termini be beyond the seas, Bennett v. Peninsular and Oriental Company, 6 C. B. 775; Crouch v. London and North-Western Rail. Co., 14 C. B. 255. [Pinciani v. The London & S. W. Rail. Co., 18 C. B. 226; and though the termini be not fixed, and though in the case of a bargeowner a barge was let to one person only for each voyage. The Liver Alkali Co. v. Johnson, L. R. 7 Exch. 267, 41 L. J. Exch. 110; but see Scaife v. Farrant, L. R. 10 Ex. 358, Ex. Ch., and the remarks of Cockburn, C.J., in his elaborate review of this branch of the law in Nugent v. Smith, 1 C. P. D. 423; 45 L. J. C. P. 697.] A carman, however, who undertakes casual jobs, and does not ply from one fixed terminus to another, is not a common carrier. Brind v. Dale, 2 M. & Rob. 80.

A person who conveys passengers only is not a common carrier. Aston v. Heaven, 2 Esp. 533; Christie v. Griggs, 2 Camp. 79; Sharpe v. Grey, 9 Bing. 457. [So railway companies are not common carriers of passengers. Blake v. G. W. Rail. Co., 7 H. & N. 987, 31 L. J. Exch. 346; Readhead v. Mid. Rail. Co., L. R. 4 Q. B. 379, 38 L. J. Q. B. 169; Wright v. Mid. Rail. Co., L. R. 8 Exch. 437, 42 L. J. Exch. 89.] (But see Brotherton v. Wood, 3 B. & B. 54, and Carpue v. London and Brighton Rail. Co., 5 Q. B. 747.) Nor is a cab proprietor as to luggage taken with the passengers. Ross v. Hill, 2 C. B. 877; Powles v. Hider, 6 E. & B. 207 [and see Upshare v. Ardee, 1 Com. Rep. 25].

Railway companies [though not, as we have seen, common carriers of passengers] are common carriers of goods [including it seems live animals. McManus v. Lanc. & Y. Rail. Co., 4 H. & N. 327; Kendall v. L. S. W. Rail. Co., L. R. 7 Exch. 373, 41 L. J. Exch. 184], unless exempt by some special provision. Palmer v. Grand Junction Canal Co., 4 M. & W. 749; Pickford v. Grand Junction Railway Co., 10 M. & W. 399; Parker v. Great Western Rail. Co., 7 Scott N. R. 835. That is to say of goods which they [are specially bound by statute to carry, or] profess to carry, or actually carry for persons generally, but not of goods which they have not professed to carry, and are not in the habit of carrying, or only carry under special circumstances, or subject to express stipulations, limiting their liability in respect of them. Johnson v. Midland Rail. Co., 4

Exch. 367. 6 Railway C. 61; York, Newcastle, and Berwick Rail. Co. v. Crisp, 14 C. B. 527; Crouch v. London and North-Western Rail. Co., 14 C. B. 255; Hughes v. Great Western Rail. Co., 14 C. B. 637; Slim v. Great Northern Rail. Co., 14 C. B. 647 [Aldridge v. Great Western Rail. Co., 15 C. B. N. S. 582; Harrison v. London, Brighton, and South Coast Rail. Co., Cam. Scac. 2 B. & S. 152, 31 L. J. Q. B. 113; cf. Richardson v. North-Eastern Rail. Co., L. R. 7 C. P. 75, 41 L. J. C. P. 60: Rumsey v. N. E. Rail. Co., 14 C. B. N. S. 641, and Stewart v. London and North-Western Rail. Co., 3 H. & C. 135; 33 L. J. Ex. 199, cases of excursion trains, of which the last may be treated as overruled (see per Brett, L.J., Cohen v. S. E. Rail. Co., 2 Ex. D. 253; 46 L. J. Ex. 417).

And notwithstanding some dicta to the contrary (see per Pollock, C.B., Stewart v. London and North-Western Rail. Co., ubi sup.; and per Willes, J., Talley v. Great Western Rail. Co., L. R. 6 C. P., p. 51), it would seem that, subject to statutory exemptions, they are common carriers of passengers' personal luggage, which under their several acts of parliament they are bound to carry free of charge, Macrow v. Great Western Rail. Co., L. R. 6 Q. B., at p. 618; and see Cohen v. S. E. Rail. Co., ubi sup.; but this absolute liability may be modified where the passenger himself takes charge of his luggage in such a manner as to raise an implied condition that he shall himself take reasonable care, Talley v. Great Western Rail. Co., L. R. 6 C. P. 44; and to fix them with responsibility for the loss of luggage so carried, negligence must be proved, Bergheim v. G. E. Rail Co., 3 C. P. D. 221; 47 L. J. C. P. 318; and see Bunch v. G. W. R. Co., 17 Q. B. D. 215; 55 L. J. Q. B. 427. But unless such a condition can be implied from the circumstances of the case, their general liability will continue, Richards v. London, Brighton, and South Coast Rail. Co., 7 C. B. 839; Le Couteur v. London and South-Western Rail. Co., L. R. 1 Q. B. 54, 35 L. J. Q. B. 40. And therefore, in the former of the two cases last cited, the company were held responsible for the loss of a dressing-case accompanying the person of the passenger and lost in the course of being put into a hackney carriage at the station of arrival. And see Butcher v. South-Western Rail. Co., 16 C. B. 13; Midland Rail. Co. App., Bromley, Resp., 17 C. B. 372. And where a railway company bound by statute to carry passengers' wearing apparel without extra charge, refused to carry a bundle of the plaintiff's clothing otherwise than at his risk, they were held liable for such refusal. Munster v. South-Eastern Rail, Co., 4 C. B. N. S. 676. They will not, however, be responsible as common carriers for luggage other than the personal luggage of the passengers, and not packed so as to make its nature obvious. Great Northern Rail. Co. v. Shepherd, 8 Exch. 30 [Cahill v. London and North-Western Rail. Co., 10 C. B. N. S. 154, affirmed in error, 13 C. B. N. S. 818; 31 L. J. C. P. 271; Belfast and Ballymena Rail. Co. v. Keys, 9 H. L. C. 556; Phelps v. London and North-Western Rail, Co., 19 C. B. N. S. 321, 34 L. J. C. P. 259. And as to what is personal luggage, see the last case, and Hudston v. Midland Rail. Co., L. R. 4 Q. B. 366, 38 L. J. Q. B. 213.

As the duty thrown upon the carrier by receiving the passenger and his luggage to be carried for reward, though arising out of a contract, is independent of the question by whom the reward is paid, a company has been held liable for the loss of his luggage to a servant whose fare has been paid by his master. Marshall v. York, Newcastle, and Berwick Rail. Co., 11 C. B. 655. An injury to a servant while a passenger upon a railway upon a ticket taken by himself is not such a wrong done to the servant as to enable a master to maintain an action for loss of service. Alton v. Midland Rail. Co., 19 C. B. N. S. 213, 34 L. J. C. P. 292. And see Baylis v. Lintott, L. R. 8 C. P. 345, 42 L. J. C. P. 119. Nor can a master recover for the loss of his portmanteau taken by the servant with

his own luggage, the servant paying his own fare, Beecher v. G. E. Rail. Co., L. R. 5 Q. B. 241. And as to how far the duty of the railway company to a passenger is independent of contract, see Foulkes v. Met. Dist. Rail. Co., 5 C. P. D. 157]. Questions involving the liability of railway [or canal companies as carriers of goods, must, however, now be considered in connection with the act of 17 & 18 Vict. c. 31, stated in a subsequent part of this note].

The extraordinary liabilities of a carrier were imposed upon him in consequence of the public nature of his employment, which rendered his good conduct a matter of importance to the whole community. He is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey, or is not in the habit of conveying [and does not profess to convey]. Jackson v. Rogers, 2 Show. 327; Riley v. Horne, 5 Bing. 217; Lane v. Cotton, 1 Lord Ray. 646; Edwards v. Sherratt, 1 East 604; Batson v. Donovan, 4 B. & A. 21 [Johnson v. Midland Rail. Co., supra, per Parke, B.]. And in a declaration against him for refusing to carry, it is enough to aver readiness and willingness to pay the hire without a formal tender, Pickford v. Grand Junction Rail. Co., 8 M. & W. 373; Wyld v. Pickford, 8 M. & W. 443. The hire charged must be no more than a reasonable remuneration to the carrier [though at common law there is no liability to carry at equal rates for all customers; Baxendale v. Eastern Counties Rail. Co., 4 C. B. N. S. 63, 78, 83; better reported in 27 L. J. C. P. 145, where it is pointed out that charging less to one than another is evidence, though not conclusive, that the greater charge is unreasonable. And see the opinion of Blackburn, J., in Dom. Proc. in Sutton v. Great Western Rail. Co., 38 L. J. Exch. 177, L. R. 4 H. L. Cas. 226.

But under the "equality clauses" in special acts, and s. 90 of The Railway Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, railway companies are bound to charge equally to all persons in respect of all goods; Pickford v. Grand Junction Rail. Co., 10 M. & W. 399; Baxendale v. London and South-Western Railway Co., L. R. 1 Ex. 137; L. & N.-W. Rail. Co. v. Evershed, 3 App. Cas. 1029, 48 L. J. Q. B. 22. And it is now finally decided that money exacted in excess in disregard of the equality clauses of railway acts, can be recovered back in an action for money had and received, Sutton v. Great Western Rail. Co., ubi supra. By 17 & 18 Vict. c. 31, ss. 2, 3, and 6, the Court of Common Pleas, or any judge of that court, was empowered to restrain by injunction any railway or canal company from giving undue or unreasonable preference to any particular person or description of traffic. See In re Caterham Rail. Co., 1 C. B. N. S. 410; Palmer v. London, Brighton, and South Coast Rail. Co., L. R. 6 C. P. 194, 40 L. J. C. P. 133. But the effect of s. 6 is to deprive the party grieved of any remedy by action for breach of the provisions of s. 2. Denaby, &c., Co. v. M. S. & L. Rail. Co., 14 Q. B. D. 209, 54 L. J. Q. B. 103, though some doubts were expressed on this point by Halsbury, L. C., in the House of Lords, 11 App. Cas. 97, and Bramwell, L. J., in Evershed's Case, 3 Q. B. D. 1351, had appeared to assume that such a right existed. The jurisdiction conferred by sect. 3 is now transferred to the commissioners appointed under 36 & 37 Vict. c. 48. See sect. 6].

As a general rule, "if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is," per Parke, B., Walker v. Jackson, 10 M. & W. 169, where it was held that the uncommunicated fact, that a carriage contained valuable jewelry and watches, did not exonerate the owners of a ferry over which it was carried from liability for a loss, which was alleged to have been partly occasioned by the weight. [But a railway

company is not liable for the loss of merchandise delivered to them by a passenger as his personal luggage to be carried free, without notice that the parcel contains merchandise, Cahill v. The London and North-Western Rail. Co., 10 C. B. N. S. 154; affirmed in error, 13 C. B. N. S. 818; Belfast and Ballymena Rail. Co. v. Keys, 9 H. of L. C. 556.] In Crouch v. London and North-Western Rail. Co., 7 Exch. 705; Same v. Same, 14 C. B. 255, 7 Rail. C. 717, it was considered that a carrier has no general right to refuse to carry a parcel upon the ground of a refusal of information as to its contents, there being nothing to show that such information was necessary.

While the goods are in [the carrier's] custody, he is bound to the utmost care of them: and, unlike other bailees falling under the same class, he is, at common law, responsible for every injury sustained by them occasioned by any means whatever, except only the act of God, or the King's enemies, 1 Inst. 89; Dale v. Hall, 1 Wils. 281; Covington v. Willan, Gow, 115; see Davis v. Garrett, 6 Bing. 716; Bourne v. Gattliffe, 3 Scott, N. R. 604, 11 Cl. & Fin. 45 [Bristol and Exeter Rail. Co. v. Collins, 7 H. of Lords C. 194, 29 L. J. Exch. 41; Oakley v. Portsmouth, &c., Co., 11 Exch. 618; Briddon v. Great Northern Rail. Co., 28 L. J. Exch. 51; subject however to the further qualification, that he is not responsible for damages arising from the natural deterioration or inherent vice of the thing carried; in such cases his position and immunities are those of an insurer. See per Willes, J., in Blower v. The Great Western Rail. Co., L. R. 7 C. P. 662. Thus, where the owner of some salt cake, knowing it to be a substance likely to destroy goods with which it might come in contact, shipped it in bulk on board the defendant's ship, without informing him of its destructive nature, it was held that the defendant was not liable for an injury to the article, caused by its having corroded some casks, near to which it had been stowed. In such cases, the shipper is liable to the shipowner for damage caused by the destructive article (see Hutchinson v. Guion, 5 C. B. N. S. 149; Brass v. Maitland, 6 E. & B. 470; Alston v. Herring, 11 Exch. 822; Hearne v. Garton, 28 L. J. M. C. 216; and s. 329 of the Merchant Shipping Act, 1854); and to the carrier's servant for injury to him, Farrant v. Barnes, 11 C. B. N. S. 553; 31 L. J. C. P. 137. It would seem, however, that there is no warranty by the shipper that the goods are not unfit to be carried by reason of concealed defects, at all events where the shipowner has had an opportunity of inspecting them, Acatos v. Burns, 3 Ex. D. 282. In Blower v. Great Western Rail. Co., ubi supra, the defendants were held not to be responsible for the loss of a horse which happened, without any negligence on their part, through the inherent vice of the animal itself. See also Kendall v. London and South-Western Rail. Co., L. R. 7 Exch. 373, 41 L. J. Exch. 184. Probably on the same principle in Barbour v. South-Eastern Rail. Co., 34 L.T.67, the defendants were held not to be responsible for damage to furniture arising solely from improper packing. For an examination of what is meant by the act of God, see Nugent v. Smith, 1 C. P. D. 423; 45 L. J. C. P. 697; Nitro-Phosphate, &c., Co. v. L. & St. K. Dock Co., 9 Ch. D. 503].

However, when the increase of personal property throughout the kingdom, and the frequency with which articles of great value and small bulk were transmitted from one place to another, had begun to render this degree of liability intolerably dangerous, carriers, on their part, began to insist that their employers should, in such cases, either diminish it, by entering into special contracts to that effect upon depositing their goods for conveyance, or should pay a rate of remuneration proportionable to the risk undertaken. To this end, they posted up and distributed written or printed notices, to the effect that they would not be accountable for property of more than a specified value, unless the owner had insured and paid an additional premium for it. If this notice was not commu-

nicated to the employer, it was of course ineffectual. Kerr v. Willan, 6 M. &. S. 150. (See, as to a bye-law not communicated, Great Western Rail. Co. v. Goodman, 12 C. B. 313.) But if it could be brought home to his knowledge, it was looked upon as incorporated into his agreement with the carrier, and he became bound by its contents, Mayhew v. Eames, 3 B. & C. 601; Rowley v. Horne, 3 Bing. 2; Nicholson v. Willan, 5 East, 507.

Still the carrier, notwithstanding his protection by the notice, was bound to avoid gross negligence; and if the property was lost or injured by such negligence, he was responsible, Smith v. Horne, 2 Moo. J. B. 18; Wyld v. Pickford, 8 M. & W. 443; Butt v. Great Western Rail. Co., 11 C. B. 140; Hinton v. Dibbin, 2 Q. B. 646 [and the judgment of Lord Wensleydale, and the opinion of Blackburn, J., in Dom. Proc. in Peek v. The North Staffordshire Rail. Co., 32 L. J. Q. B. 246, 250, 273]. Unless, indeed, the employer had lulled his vigilance by an undue concealment of the nature of the trust imposed on him, for such conduct would have exonerated the carrier, even had he given no notice — Batson v. Donovan, 4 B. & A. 21; Miles v. Cattle, 6 Bing. 743; see also 4 Burr. 2301; B. N. P. 71.

Very many questions, as was naturally to be expected, having arisen upon the construction of these notices, and whether they had come to the customer's knowledge, the legislature thought proper to step in, and by several enactments to regulate the responsibility of carriers by land and water. The Land-Carriers' Act is st. 11 Geo. 4 & 1 Will. 4, cap. 68, which enacts (sect. 1) that no common carrier by land for hire shall be liable for loss [see Hearn v. London and South-Western Rail. Co., 10 Exch. 793; Pinciani v. London and South-Western Rail. Co., 18 C. B. 226; Millen v. Brasch, 10 Q. B. D. 142; 52 L. J. Q. B. 127, where the claim was for damages for a temporary loss or injury to any gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewelry, watches, clocks, timepieces, trinkets (see [Bernstein v. Baxendale, 6 C. B.N.S. 251, overruling] Davey v. Mason, 1 Car. &. M. 45); bills, banknotes, orders, notes or securities for payment of money [Stocssiger v. South-Eastern Rail. Co., 3 E. & B. 549, acted upon in McCall v. Taylor, 19 C. B. N. S. 301, 34 L. J. C. P. 365]; stamps, maps, writings, title-deeds, paintings, engravings, pictures [Henderson v. London and North-Western Rail. Co., L. R. 5 Exch. 90; Woodward v. London and North-Western Rail. Co., 3 Ex. D. 121; 47 L. J. Ex. 263]; gold or silver plate, or plated article, glass (see Owen v. Burnett, 4 Tyrwh. 133 [Bernstein v. Baxendale, ubi sup.; Glover v. London and South-Western Rail. Co., 37 L. J. Q. B. 57, L. R. 3 Q. B. 25]; china, silks — manufactured or unmanufactured - wrought up or not wrought up with other materials [(see Bernstein v. Baxendale, Brunt v. Midland Rail. Co., 2 H. & C. 889, 33 L. J. Exch. 187; Flowers v. South-Eastern Rail. Co., 16 L. T. N. S. 329)]; furs (see Mayhew v. Nelson, 6 C. & P. 59), or lace [(Treadwin v. Great Eastern Rail. Co., L. R. 3 C. P. 308; other than machine-made lace, "The Carriers' Act Amendment Act, 1865," 28 & 29 Vict. c. 94, s. 1)], contained in any parcel or package [(Whaite v. Lancashire and Yorkshire Rail. Co., L. R. 9 Exch. 67)] when the value exceeds the sum of 10l., unless at the time of delivery the value and nature of the article shall have been declared, and the increased charges, or an engagement to pay the same, accepted by the person receiving the parcel.

This act applies to the case of a delivery to the carrier or his servant, whether at his office or elsewhere, Hart v. Baxendale, 6 Exch. 769.

By sect. 2, the carrier may demand for such parcels an increased rate of charge, which is to be notified by a notice affixed in his office, and customers are to be bound thereby, without further proof of the notice having come to their knowledge. Carriers who omit to affix the notice are, by sect. 3, pre-

cluded from the benefit of this act, so far as the right to extra charge is concerned; but it seems that they are, even in that case, entitled to a declaration of the value and nature of the goods, *Hart v. Baxendale*, 6 Exch. 769 [*Pinciani v. London and South-Western Rail. Co.*, 18 C. B. 226]; and, by sect. 4, they can no longer by a public notice limit their responsibility in respect of articles not within the act.

Special contracts, however, between the carrier and his employer are still allowed [(subject in the case of railway and canal companies to the provisions of the Railway and Canal Traffic Act stated infra)], and are not affected by this statute. And such a contract may be inferred by a jury from the fact of a notice given by the carrier to his customer, and the customer having subsequently sent goods to be carried, without objecting to the terms of the notice, Walker v. York and North Midland Rail. Co., 2 E. & B. 750. [And where the customer had the means of knowing, Stewart v. London and North-Western Rail. Co., 3 H. & C. 135, 33 L. J. Exch. 199; Van Toll v. South-Eastern Rail. Co., 12 C. B. N. S. 75, 31 L. J. C. B. 241; Zunz v. South-Eastern Rail. Co., L. R. 4 Q. B. 539, 38 L. J. Q. B. 209.] See also Chippendale v. Lancashire and Yorkshire Rail. Co., 21 L. J. Q. B. 22, where the carriers were held protected by their special contract, though the carriage was insufficient. To the same effect are Great Northern Rail. Co. v. Morville, 21 L. J. Q. B. 319; Austin v. Manchester, &c., Rail. Co., 10 C. B. 454; and see Same v. Same, 16 Q. B. 600; Shaw v. York and North Midland Rail. Co., 13 Q. B. 347; Carr v. Lancashire and Yorkshire Rail. Co., 7 Exch. 707; where the injury was collision, and Platt, B., dissented; Fowles v. Great Western Rail. Co., 7 Exch. 699, where the loss was beyond the terminus of the railway; and Wyld v. Pickford, 8 M. & W. 443 [Scaife v. Tarrant, L. R. 10 Ex. 358. Notwithstanding the contract, the carrier may avail himself of the protection of the 1st section unless the terms of the contract necessarily exclude it. Baxendale v. Great Eastern Rail. Co., L. R. 4 Q. B. 244, 38 L. J. Q. B. 137.

Upon the question whether a notice or condition has been so brought to the knowledge of the contracting party as to render it part of the contract, see Henderson v. Stevenson, L. R. 2 H. L. Sc. 470; Harris v. Great Western Rail. Co., 1 Q. B. D. 515, 45 L. J. Q. B. 729. In the former case a passenger was held not to be bound by conditions as to the company's liability for his luggage, which were printed on the back of his ticket, but to which there was nothing on the front of the ticket to direct his attention, and which he had not in fact read. In the latter the plaintiff was precluded from recovering for the loss of parcels deposited in the defendant's cloak-room, the company being held entitled to the benefit of a condition printed on the back of a receipt note and not read by the plaintiff, but to which there was a reference on the front of the note. A contrary view was taken in Parker v. South-Eastern Rail. Co., 1 C. P. D. 618, 45 L. J. C. P. 515, C. A. 2 C. P. D. 416, 41 L. J. C. P. 768; a case very similar to the latter in its facts, but in which the jury expressly negatived negligence on the part of the plaintiff. On appeal a new trial was ordered on the ground that the true question was whether the company had done what was reasonably sufficient to give the plaintiff notice of the condition, Bramwell, L. J., however, being of opinion that it was a question of law, and that the defendants were entitled to judgment. See also Burke v. S. E. R. Co., 5 C. P. D. 1, 49 L. J. C. P. 107, and Watkins v. Rymill, 10 Q. B. D. 178, 52 L. J. Q. B. 121, where all the cases are elaborately examined.

The carrier loses the benefit of the act if, after declaration of value, he receives the goods without demanding the extra charge, *Behrens* v. *Great Northern Rail. Co.*, 6 H. & N. 366; affirmed in error, 7 H. & N. 950, 31 L. J.

Exch. 299. And the carrier has an insurable interest in goods the value of which has not been declared in accordance with the act, London and North-Western Rail. Co. v. Glyn, 28 L. J. Q. B. 188].

By sect. 5, the act is not to protect carriers from their liability to answer for loss occasioned by the felonious acts of their own servants, nor is it to protect the servant from answering for his own neglect or misconduct. Every person actually engaged in the performance of the contract of carriage and delivery is a servant of the carrier within the meaning of this section, though not strictly so within the decision in Quarman v. Burnett, 6 M. & W. 499, and the long series of cases by which it has been followed, Martin v. South-Western Rail. Co., 2 Exch. 415. It is to be observed that felony of the carrier's servant without gross negligence on the part of the employer, was not a ground of liability in cases within the carrier's notice or special contract, though it is expressly made so in cases within the statute, Butt v. Great Western Rail. Co., 11 C. B. 140 [Great Western Rail. Co., app. Rimell, resp., 18 C. B. 575. The case of Butt v. Great Western Rail. Co. has been frequently misunderstood. It was not a case within the statute. The plea alleged a non-compliance with the conditions of the notice; the plaintiff new assigned that the loss had been caused by the felony of the defendant's servants; and on special demurrer to this new assignment, the plaintiff was allowed to amend by replying a loss by felony through the gross negligence of the defendant. Mr. Justice Willes is erroneously reported to have said, in Metcalfe v. The London and Brighton Rail. Co., 4 C. B. N. S. 309, 310, that the demurrer in Butt v. Great Western Rail. Co. was on the ground "that carriers are not answerable at common law for the felonious acts of their servants," and in S. C. 27 L. J. C. P. 207, that the plea was "an excuse under the Carriers' Act." As to evidence of a felony by the carrier's servants, see The Great Western Rail. Co., app. Rimell, resp., supra; and Keys v. Belfast and Ballymena Rail. Co., 8 Ir. C. L. R. 167; reversed in Dom. Proc. 9 H. of L. C. 556. Vaughton v. L. N. W. Rail. Co., L. R. 9 Ex. 93; McQueen v. Great Western Rail. Co., L. R. 10 Q. B. 569; 44 L. J. Q. B. 130; Turner v. Great Western Rail. Co., 34 L. T. 22; Way v. G. E. Rail. Co., 1 Q. B. D. 692; 45 L. J. Q. B. 874.

As to cases where the contract is for conveyance by land and water, and the goods are lost by land, see Le Conteur v. The London and South-Western Rail. Co., L. R. 1 Q. B. 54, 35 L. J. Q. B. 40; Baxendale v. Great Eastern and Midland Rail. Co., L. R. 4 Q. B. 244, 38 L. J. Q. B. 137, and 31 & 32 Vict. c. 119, s. 14. The protection of the act extends to goods within it which have been lost at a point beyond their destination, to which they have been carried through the negligence of the carrier, Morritt v. N. E. Rail. Co., 1 Q. B. D. 302, 45 L. J. Q. B. 289; and see Millen v. Brasch, 10 Q. B. D. 142, 52 L. J. Q. B. 127].

It was held in one case that, notwithstanding this statute, the carrier is still answerable for gross negligence on his part, which has occasioned a loss of property such as the act directs to be insured, even although the owner has neglected to insure it; for the protection given to the carrier by the act was substituted for the protection which he formerly derived from his own notice, and the former, therefore, it was supposed, would not protect him in a case in which the latter would not have been allowed to do so in consequence of his misconduct, Owen v. Burnett, 4 Tyrwh. 133. But the Court of Queen's Bench decided that, in a case within the Carriers' Act, the carrier is not liable for a loss by his servant of the articles mentioned in the statute, even though it may have been occasioned by gross negligence not amounting to a misfeasance, Hinton v. Dibbin, 2 Q. B. 646, where the subject is discussed in a most elaborate judgment.

The monopoly enjoyed by railway companies led in some cases to their restricting their liability by special contracts with customers who could not afford the time or expense of litigating the right to refuse to carry except upon the terms of such contracts. [Moreover, in a series of decisions from Shaw v. The York and North Midland Rail. Co., 13 Q. B. 347; to Carr v. The Lancashire and Yorkshire Rail. Co., 7 Exch. 707; Walker v. The York and North Midland Rail. Co., 2 E. & B. 750, the courts had relaxed the rule of the older cases (see supra, p. 242), that a carrier could not by contract protect himself from gross negligence, and had held the employers bound by special contracts the terms of which were large enough to exclude the carrier's liability for gross negligence, misconduct, or even fraud (see the opinion of Blackburn, J., in Peek v. North Staffordshire Rail. Co., 32 L. J. Q. B., at p. 246), and such is the rule now acted upon in the case of a passenger, or where the Railway and Canal Traffic Act, noticed infra, does not apply; see Macauley v. Furness Rail. Co., L. R. 8 Q. B. 57; Zunz v. The South-Eastern Rail. Co., L. R. 4 Q. B. 539, 38 L. J. Q. B. 209; Gallin v. L. & N. W. Rail. Co., L. R. 10 Q. B. 212; 44 L. J. Q. B. 89; and compare The Duero, L. R. 2 A. & E. 393; see, however, P. & O. Steam Nav. Co. v. Shand, 3 Moore, P. C. C. N. S. 272; per Sir W. Erle; Martin v. G. Ind. Pen. Rail. Co., L. R. 3 Exch. 9, 37 L. J. Ex. 27.]

This led to the enactment of 17 & 18 Vict. c. 31, "The Railway and Canal Traffic Act, 1854" [extended to traffic carried on by railway companies' steamers, by 26 & 27 Vict. c. 92, s. 31]. That Act, by the first six sections, provides for enforcing against railway and canal companies, by means of proceedings in the Court of Common Pleas in England, in any of the superior courts in Ireland, in the Court of Session in Scotland, or before any judge of any such court, at the instance of persons aggrieved, the duty of making arrangements for receiving and forwarding traffic of every description without delay and without partiality. [By seet. 1, "traffic" is defined as including "not only passengers and their luggage, and goods, animals, and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, wagons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company." See Dickson v. G. N. R. Co., 18 Q. B. D. 176, 56 L. J. Q. B. 111, stated infra.

The Act has been explained and amended by 36 & 37 Vict. c. 48, which transfers the before-mentioned powers from the Court of Common Pleas to the Railway Commissioners.]

The seventh section of the Traffic Act enacts, that "every such company as aforesaid shall be liable for the loss of or for any injury [Allday v. Great Western Rail. Co., 34 L. J. Q. B. 5] done to any horses, cattle, or other animals, or to any articles, goods, or things [(which include passengers' luggage. Cohen v. South-Eastern Rail. Co., 2 Ex. D. 253, 46 L. J. Ex. 417); in the receiving [Van Toll v. South-Eastern Rail. Co., 12 C. B. N. S. 75; Hodgman v. The W. Midland Rail. Co., 5 B. & S. 173, 33 L. J. Q. B. 233; affirmed in error, 35 L. J. Q. B. 85 (as to remarks of Cockburn, C. J., at the end of his judgment in this case — see Hart v. Baxendale, 6 Exch. 769); forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants, Harrison v. The London and Brighton Rail. Co., 2 B. & S. 122, 31 L. J. Q. B. 113, 115, 2 B. & S. 152, in Cam. Scac., per Erle, C. J., notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the

said animals, articles, goods, or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable: provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned: that is to say, for any horse fifty pounds; for any neat cattle, per head, fifteen pounds; for any sheep or pigs, per head, two pounds; unless the person sending or delivering the same to such company shall at the time of such delivery, have declared them | Robinson v. The South-Western Rail. Co., 19 C. B. N. S. 51, 34 L. J. C. P. 234; M Cance v. The North-Western Rail. Co., 7 H. & N. 477, 3 H. & C. 343, 31 L. J. Exch. 65] to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4 & 1 Will. 4, c. 68, and shall be binding upon such company in the manner therein mentioned: provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: provided also, that no special contract between such company and any other parties respecting the receiving [Van Toll v. South-Eastern Rail. Co., supra], forwarding or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said act of 11 Geo. 4. & 1 Will. 4, c. 68, with respect to articles of the descriptions mentioned in the said act."

[The courts have experienced great difficulty in construing this enactment, so as to make the several clauses consistent. It was contended in one case that the operation of the act as regards animals was confined to those named in the second proviso of the seventh section. It has been held, however, that it extends to all animals, but that the limitation of damages is confined to those expressly named in the proviso, which is to be read thus, "Provided always that no greater damages shall be recovered for the loss of or injury to any of such animals as are hereinafter mentioned," viz., horses, neat cattle, sheep, and pigs; and therefore the sender of a dog, which was killed through the negligence of a railway company, was not prevented from recovering its full value by reason of not having signed the required declaration. Harrison v. The London and Brighton Rail. Co., 29 L. J. Q. B. 209, reversed in error, but on another point.

It was also for some time undecided whether, on the one hand, a special contract which had been signed was valid within the meaning of this section, although it might not be just and reasonable, and whether, on the other, a notice or condition which was just and reasonable was valid if not signed. In Wise v. Great Western Rail. Co., 1 H. & N. 63, a special contract which was signed was held to be valid without reference to the question of its reasonableness; see also the judgments of Martin and Bramwell, B. B., in Partington v. South Wales Rail. Co., 1 H. & N. 392; and Beale v. South Devon Rail. Co., 5 H. & N. 875; in error, 3 H. & C. 337. But in Simons v. Great Western Rail. Co., 18 C. B. 805, a contract was held to be void on the ground of unreasonableness, although it was signed; and in McManus v. Lancashire, &c., Rail. Co., 2 H. & N. 693, a signed special contract was considered to be reasonable, and there-

fore binding. In Peck v. North Staffordshire Rail. Co., E. B. & E. 958, a condition which was held to be reasonable was, nevertheless, held to be void because it was unsigned (Erle, J., dissentiente). The two last-mentioned cases were taken up to the Exchequer Chamber, and in McManus v. Lancashire, &c., Rail. Co., 4 H. & N. 327, the court of error, reversing the judgment of the Exchequer, held (dissentiente Erle, J.) that the special contract which the plaintiff had signed was void because it was unreasonable.—"In effect," said Mr. Justice Williams, in delivering the judgment of the majority of the court of error, "before the statute every case in which a special limited liability was substituted for the general common-law obligation of the carrier, whether by notice acquiesced in or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of the law.

According to this view, the words "special contract" and "conditions," as used in the act, are synonymous terms; consequently when the case of the North Staffordshire Rail. Co. v. Peek, E. B. & E. 986, came at a later period before the Court of Exchequer Chamber, it was considered to be a settled point, that the act does require that conditions should be signed. That was an action against the railway company as common carriers, for negligently carrying three marble chimney-pieces. 4th plea: Special contract exempting defendants from responsibility for injury to marbles unless insured, and no insurance of the marbles in question. 5th plea: Condition to the same effect, alleging it to be reasonable. Issues thereon: verdict for defendants on both pleas. The plaintiff had had notice of such condition, and in a letter to the defendants had requested them "to forward the three cases of marble not insured," which they did. On a special case in the Exchequer Chamber it was held, reversing the decision of the Queen's Bench, that the defendants were entitled to have the verdict entered for them upon the 4th plea, on the ground that the plaintiff's letter, coupled with the forwarding of the goods in pursuance of it, and some other correspondence, constituted a special contract signed within the meaning of the 4th proviso in the 7th section of the act. This decision was in its turn reversed by the House of Lords, on the ground that the condition was not just and reasonable, and that there was no special contract signed, their lordships being, however, divided as to whether the condition being reasonable must also be embodied in a signed contract, Lords Westbury, L. C., and Wensleydale adopting the interpretation of Jervis, C. J., in Simons v. Great Western Rail. Co., and of Williams, J., in delivering the judgment of the Exchequer Chamber in McManus v. Lancashire, &c., Rail. Co., and holding, that it must; that, in fact, "condition," and "special contract," in the statute are synonymous; Lords Cranworth and Chelmsford holding that they were two different things, and that a condition being reasonable need not be signed. Some of the many observations of the Lord Chancellor may be cited here.

"I think," he said, "the true construction of the 7th section of the act may be expressed in a few words. I take it to be equivalent to a simple enactment, that no general notice given by a railway company shall be valid in law, for the purpose of limiting the common-law liability of the company as carriers. Such common-law liability may be limited by such conditions as the court or judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner, or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person. . . . The words "of the act "expressly state that any condition having for its object to relieve a company from liability occasioned by the neglect or default of such company shall be null and void. Now, my lords, if

the present condition were embodied in a contract between the company and the owner of the goods delivered to be carried by that company, the necessary effect of such a contract would be, that it would exempt the company from responsibility for injury, however caused; including, therefore, gross negligence, and even fraud or dishonesty on the part of the servants of the company. For the condition is expressed without any limitation or exception." Therefore, his lordship considered the condition unreasonable, and he held that it was not embodied in a special contract in writing, because the words "not insured" did not refer "to the written condition, or afford any ground upon which the written condition can be regarded as incorporated" in the contract. The letter, said Lord Cranworth, "shows that the person sending the goods chose to send them with the incidents attaching by law to the sending of the marbles uninsured; but it does not show that he agreed to a stipulation by the company that they were to be absolved from responsibility by reason of their being so sent; still less that he so agreed by reason of their not being insured according to their value." See Peek v. North Staffordshire Rail. Co., 32 L. J. Q. B. 241.

The condition which in McManus v. Lancashire, &c., Rail. Co. was held to be unreasonable was that "the company would not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling upon the railway or in their vehicles." The court was of opinion that this condition, if held to be valid, would protect the company from liability in respect of their own gross negligence or misconduct. See Gregory v. The West Midland Rail. Co., 2 H. & C. 944, 33 L. J. Exch. 155. Rooth v. North-Eastern Rail. Co., L. R. 2 Exch. 173. In Beale v. South Devon Rail. Co., 5 H. & N. 875, affirmed in error, 3 H. & C. 337, and already cited, the company gave notice that they would only convey fish on their line by special agreement, and the condition in question provided "that the company should not be responsible under any circumstances for loss of market, or for other loss or injury from any cause whatever, other than gross negligence or fraud," and this condition was held to be valid, Martin, B., dissentiente, and see Lord v. Midland Rail. Co., L. R. 2 C. P. 339. In Simons v. Great Western Rail, Co., supra, condition framed for the purpose of absolving the company from responsibility for the loss or non-delivery of goods by reason of insufficient or improper package was adjudged to be unjust and unreasonable. In Harrison v. London, Brighton, and South Coast Rail. Co., 3 B. & S. 122, 31 L. J. Q. B. 113, overruling in error a decision between the same parties, a condition against liability for loss or damage to horses or dogs above certain values, unless the value was declared, the company only to be liable for the declared value, and extra charges to be paid according to the value, was held to be reasonable; this case was, however, treated as overruled by Peek v. The North Staffordshire Rail. Co., ubi sup., in Ashendon v. London and Brighton Rail. Co., 5 Ex. D. 190. See also Robinson v. Great Western Rail. Co., 35 L. J. C. P. 123. Conditions protecting the company against claims for loss unless made within seven days from the time at which the goods should have been delivered, and against liability for the loss of goods untruly or incorrectly declared or described by the sender, were held to be binding, in Lewis v. Great Western Rail. Co., 5 H. & N. 867. A condition against liability for delay was adjudged unreasonable in Allday v. Great Western Rail. Co., 5 B. & S. 903, 34 L. J. Q. B. 5; for damage beyond the limits of the company's railway, was held reasonable in Aldridge v. Great Western Rail. Co., 15 C. B. N. S. 582, 33 L. J. C. P. 161, in which case it seems to have been assumed that the act applied to such a condition, but it is now decided that it does not apply to contracts made by railway companies exempting themselves from liability for loss or detention beyond the limits of their own lines, Zunz v. South-Eastern Rail.

Co., L. R. 4 Q. B. 539, 38 L. J. Q. B. 209. As to unreasonableness of part of the contract only, avoiding that part, see M'Cance v. London and North-Western Rail. Co., 7 H. & N. 477, 31 L. J. Exch. 65; and per Kelly, C. B., Rooth v. N. E. Rail. Co., L. R. 2 Ex. 178.

In Simons v. G. W. R. Co., supra, a condition was held to be valid because confined to goods carried at the lower of two rates charged by the company (see further on this point, North Staffordshire Rail. Co. v. Peek, supra, and Rooth v. North-Eastern Rail. Co., L. R. 2 Exch. 173; Lewis v. G. W. Rail. Co., 3 Q. B. D. 195, 47 L. J. Q. B. 131; Forman v. G. W. Rail. Co., 38 L. T. 851; M. S. & L. Rail. Co. v. Brown, 8 App. Cas. 703; 53 L. J. Q. B. 124, where Lord Bramwell expressed great dissatisfaction with the decision in Peek's Case).

In Dickson v. G. N. R. Co., 18 Q. B. D. 176; 56 L. J. Q. B. 111, which was an action to recover damages for injury caused by the negligence of defendants' servants to a valuable dog, a condition disclaiming liability for loss or damage to dogs beyond the sum of £2, unless a higher value should be declared at the time of delivery to the company, and a percentage of five per cent. paid upon the excess of value beyond the £2 so declared, was held by the Court of Appeal to be unreasonable, Lord Esher, M. R., and Lopes, L. J., considering that the higher or insurance rate was so excessive as practically to offer no alternative, and that in the absence of an alternative rate the condition was unreasonable. The court pointed out that the burden of showing that the contract was reasonable was thrown by the statute upon the defendants, and agreed in considering the extra charge unreasonably high.

In a very instructive judgment, Lopes, L. J., traces the history of the carrier's liability prior to the Traffic Act and explains the circumstances which led to its enactment, pointing out that before that statute railway companies were common carriers of such goods only as they professed to carry for persons generally, or were bound to carry as such. He then proceeds: "Two important matters are aimed at and hit by the Railway and Canal Traffic Act. 1854. provides that railway companies shall afford all reasonable facilities for receiving, forwarding, and delivering traffic without delay and without partiality ('traffic,' by the interpretation clause, including animals), and gives a remedy, if facilities are withheld, on application to the Court of Common Pleas, a jurisdiction now transferred to the Railway Commissioners. Since the passing of that Act, railway companies cannot in my opinion absolutely refuse to carry traffic which they have facilities for carrying, even if they did not profess to carry and did not generally carry such traffic, but would be compellable to carry it, not as common carriers, but with the liability of ordinary bailees, and subject to reasonable conditions limiting that liability. Applying that principle to the present case, I am of opinion that the defendants were not common carriers of dogs, and were not bound to carry them at their own risk, but could not refuse to carry them on reasonable terms and subject to reasonable conditions."

For the meaning of the expression owner's risk in such conditions, see D'Arc v. L. and N. W. Rail. Co., L. R. 9 C. P. 325; Mitchell v. L & Y. Rail. Co., L. R. 10 Q. B. 256, 44 L. J. Q. B. 107. And as to what amounts to wilful misconduct where the condition protects the company from liability for loss or damage except so caused, Webb v. G. W. Rail. Co., 26 W. R. 111; Lewis v. G. W. Rail. Co., 3 Q. B. D. 195, 47 L. J. Q. B. 131; Hoare v. G. W. Rail. Co., 25 W. R. 631. As to what is detention on a condition protecting against it, Gordon v. G. W. Rail. Co., 8 Q. B. D. 44, 51 L. J. Q. B. 58.

The signature to the special contract may be made by an agent of the party delivering the goods, see the *North Staffordshire Rail*. Co. v. *Peek*, E. B. & E. 986: but the provision that the special contract must be signed only applies

where the company is seeking to exempt itself from liability by the terms of such contract. Therefore, where the employer is setting up the contract, it is no answer to say that he has not signed it. Baxendale v. Great Eastern Rail. Co., L. R. 4 Q. B. 244, 38 L. J. Q. B. 137.

The question of reasonableness was argued on demurrer in *Simons* v. *Great Western Rail. Co.*; it is generally a mixed question of law and fact. See per the M. R. in *Dickson* v. G. N. R. Co., ubi supra.

The declaration of value, even though not part of the contract of carriage, will form the basis upon which damages will be assessed, M'Cance v. London & North-Western Rail. Co., 7 H. & N. 477, 31 L. J. Exch. 65. But to entitle the company to rely upon it, it must be formally made, and therefore in Robinson v. South-Western Rail. Co., 19 C. B. N. S. 51, 34 L. J. C. P. 234, the defendants were held liable for refusing to carry, uninsured, a horse whose value they had casually learnt to be above 50l.]

With respect to carriers by water, besides the exemptions for which they stipulate in their charter parties and bills of lading, which latter always contain a clause discharging them from liability for losses occasioned by "the act of God, the King's enemies, fire, and all or every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever;" the first two of which exemptions they indeed enjoyed at common law, and that from loss by fire under 26 Geo. 3, c. 86, s. 2 (which statute, however, was held to apply only to fire on board the ship, and not to a fire on board a lighter, in which the goods were being taken to the ship, Morewood v. Pollock, 1 E. & B. 743), they were further protected by the last-mentioned statute from making good loss or damage to any gold, silver, diamonds, watches, jewels, or precious stones, sustained by any robbery, embezzlement, making away or secreting thereof, unless the owner or shipper had, at the time of shipping, declared the nature and value thereof in writing.

The 6 Geo. 4, c. 155, s. 53, exempted them from liability from damage arising from the want of a duly qualified pilot, unless incurred by their own refusal or neglect to take one on board; and sect. 55, from liability for loss incurred through the default or incompetency of a licensed pilot. And now, by 17 & 18 Vict. c. 104, s. 388, "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." See The Agricola, 2 W. Robinson, 10 [Hammond v. Rogers, 7 Moore, P. C. 160, 171, Pollock v. M'Alpin, 7 Moore, P. C. 427, and for recent decisions upon cases arising under this Act, see The General Steam Navigation Co. v. British and Colonial Steam Navigation Co., L. R. 3 Exch. 330, 4 Exch. 238, 37 L. J. Q. B. 194, 38 Id. 97; The Lion, L. R. 2 P. C. 525, 37 L. J. Ad. 39; The Ocean Wave, L. R. 3 P. C. 205; The Energy, L. R. 3 A. & E. 48; The Queen v. The Lord Russell, L. R. 2 A. & E. 354.]

Where their common-law liability remained, it was from time to time much narrowed by the following acts, viz. 7 Geo. 2, c. 15, which exempted them from making good losses incurred by the misconduct of the master and mariners without their privity, to a greater extent than the value of the ship and freight (see Sutton v. Mitchell, 1 T. R. 18, Brown v. Wilkinson, 15 M. & W. 391 [The African Steamship Co. v. Swanzy, 2 K. & J. 660, 25 L. J. Cha. 870; Leycester v. Logan, 3 Kay & J. 446, 26 L. J. Cha. 306; Same v. Same, 4 K. & J. 725]), 26 Geo. 3, c. 86, s. 1, which extended the above enactment to all cases of loss by robbery by whomsoever committed, and 53 Geo. 3, c. 159, which extended it to all cases of loss occasioned without their default or privity; but this act did not

extend to vessels used solely in rivers or inland navigations, nor to any ship not duly registered according to law; nor did any of those acts extend to lighters and gabberts; Hunter v. M. Gown. 1 Bligh, 573. It should also be observed that the benefit of the three last-mentioned acts extended to owners only, not to masters, and that the last contained an express clause against relieving the master, though he might happen also to be a part owner. See Wilson v. Dickson, 2 B. & A. 2; Atkinson v. Stevens, 7 Exch. 567. The general act now in force upon this subject is the 17 & 18 Vict. c. 104, part 9, sects. 502 to 516 [(amended by 25 & 26 Vict. c. 63; see sect. 54). As to the declaration of the nature and value required by sect. 503, see Williams v. African Steamship Co., 1 H. & N. 300; and see the Common Law Procedure Act, 1860, sect. 35.

In a modern case, a condition in a bill of lading that the shipowner should not be accountable for leakage or breakage was held not to discharge him from liability for gross negligence, Phillips v. Clark, 2 C. B. N. S. 156, nor for damage to adjacent goods caused by the leakage, Thripp v. Youle, 2 C. P. D. 432, 46 L. J. C. P. 402. See also Wilton v. The Atlantic Royal Mail Co., 10 C. B. N. S. 453; 31 & 32 Vict. c. 119, s. 14; Lloyd v. General Iron Screw Colliery Co., 33 L. J. Exch. 269; Czech v. General Steam Navigation Co., L. R. 3 C. P. 15, 37 L. J. C. P. 3; Leuw v. Dudgeon, Ibid. in note, L. R. p. 17, L. J., p. 5; Grill v. General Iron Screw Colliery Co., L. R. 1 C. P. 600, 3 C. P. 476; 35 L. J. C. P. 321, 37 Id. 205; but such a condition has the effect of shifting the onus of proof, and makes it incumbent upon the consignor to give affirmative evidence of negligence. Czech v. General Steam Navigation Co., supra. In the case of The Duero, L. R. 2 A. & E. 393, 38 L. J. Adm. 69, a condition in a bill of lading excluding liability for negligence or default of master or mariner or others performing their duties was upheld.

Irrespective of the common-law liability of common carriers, there is in every contract of affreightment where the agreement does not exclude it, a warranty that the ship is seaworthy, *Kopitoff v. Wilson*, 1 Q. B. D. 377; 45 L. J. Q. B. 436. Whether such warranty extends to latent defects quære. That it does not in contracts by land has been decided in *Readhead v. Mid. Rail. Co.*, L. R. 4 Q. B. 381, though it does extend to everything except latent defects, *Francis* v. *Cockerell*, L. R. 5 Q. B. 501.

For the distinction between the common-law liability of common carriers by water, and those who are not common carriers, see *Nugent* v. *Smith*, 1 C. P. D. 423; 45 L. J. C. P. 697. In that case, Cockburn, C. J., in a historical review of the authorities, questions the position taken by Brett, J., in the court below, that no such distinction exists.

The liability of carriers by land and water is further modified by 31 & 32 Vict. c. 119, s. 14 (The Railways Regulation Act, 1868), which enacts that "where a company, by through booking, contracts to carry any animals, luggage, or goods from place to place—partly by railway and partly by sea—or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage of such animals, luggage, or goods by sea, from the act of God, the King's enemies, fire, accidents from machinery, boilers and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, luggage, or goods, be valid as part of the contract between the consignor of such animals, luggage, or goods, and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. For the pur-

poses of this section the word 'company' includes the owners, lessees, or managers of any canal or other inland navigation."

Sect. 16 incorporates the Railway and Canal Traffic Act, so that conditions affecting such traffic to be binding must be reasonable and signed, see *Cohen v. S. E. Rail. Co.*, 2 Ex. D. 253, 46 L. J. Ex. 417, where it was so held in conformity with the decision of the Irish Court of Common Pleas in *Moore v. Mid. Rail. Co.*, Ir. R. 9 C. L. 20, and with the opinion of Whiteside, C. J., who dissented from the judgment of the Irish Exchequer Chamber in *Doolan v. Mid. Rail. Co.*, I. R. 10 C. L. 37, which overruled the former case, but has since been itself overruled in Dom. Proc. 2 App. Cas. 792. Statute 34 & 35 Vict. c. 78, s. 12, provides that where a railway company under a contract for carrying persons, animals, or goods by sea procures the same to be carried in a vessel not belonging to the railway company, their liability is to be the same as though the vessel had belonged to the company, *Moore v. Mid. Rail. Co.*, ubi sup.]

Where goods consigned to a vendee are lost through the default of the carrier, the consignee is the proper person to sue, for the consignor was his agent to retain the carrier, Dawes v. Peck, 8 T. R. 330; Dutton v. Solomonson, 3 B. & P. 582; King v. Meredith, 2 Camp. 639; Brown v. Hodgson, Id. 36 [The London and North-Western Rail. Co. v. Bartlett, 7 H. & N. 400, 31 L. J. Exch. 92].

It is otherwise where the goods were sent merely for approval, Swain v. Shepherd, 1 M. & Rob. 224; or the consignee is the agent of the consignor, Sargent v. Morris, 3 B. & A. 277; or the carrier has contracted to be liable to the consignor in consideration of the latter's becoming responsible for the price of the carriage, Moore v. Wilson, 1 T. R. 659; Davis v. James, 5 Burr. 2680; or where the property in the goods has not yet passed to the vendee, as, for instance, when there is no evidence of a contract sufficient to satisfy the Statute of Frauds, and the carrier is not of the vendee's selection, Coates v. Chaplin, 3 Q. B. 483; Norman v. Phillips, 14 M. & W. 277 [Coombes v. Bristol and Exer Rail. Co., 3 H. & N. 510]; or, to speak generally, where the carrier is employed by the consignor, and the goods are at his risk, Dunlop v. Lambert, 6 Cl. & Fin. 600. See Freeman v. Birch, 1 Nev. & M. 420; S. C. 3 Q. B. 492, n. [Cork Distilleries Co. v. Gt. S. & W. Rail. Co., L. R. 7 H. L. 277-8. And see G. W. Rail. Co. v. Bagge, 15 Q. B. D. 625.

It has been held by the Court of Queen's Bench, contrary to the view taken in America, that there is no analogy between a person to whom a telegram is sent and a consignee of goods so as to make the former the proper person to sue the telegraph company, Playford v. United Kingdom Telegraph Co., L. R. 4 Q. B. 756. And an action will not lie at the suit of the consignee against the telegraph company for delivering a telegram purporting to come from a person who has not in fact sent one in such terms; for there is no consideration moving from the consignee to the company from which a contract on their part that they have authority to deliver the telegram in question may be inferred, Dickson v. Reuter's Telegraph Co., 3 C, P. D. 1, 47 L. J. C. P. 1; and for the like reason they are not liable as for a breach of duty.]

In the case of an action brought against a carrier, it is sufficient primâ facie evidence of a loss by his negligence to show that the goods never reached the consignee, or a short delivery, Hawkes v. Smith, Car. & M. 72, Rolfe, B. But where they are bailed to a booking-office keeper to be delivered to a carrier, the plaintiff must show by direct evidence, that they were not delivered to one, Gilbert v. Dale, 5 A. & E. 543; Griffith v. Lee, 1 C. & P. 110 [Midland Rail. Co. v. Bromley, 17 C. B. 372].

With regard to the mode of declaring against a carrier, formerly the practice

was to set out the custom of the realm; that was discontinued because, the custom of the realm being the law of the realm, the courts take notice of it. Afterwards the practice became to state the defendants to be common carriers for hire, totidem verbis. If to such a declaration the defendant plead[ed] an acceptance of the goods on the special terms of a carrier's notice, the plaintiff, if he meant to rely upon gross negligence as rendering the defendants liable notwithstanding the notice, must [have] repli[ed] or new assigned such negligence, Wyld v. Pickford, 8 M. & W. 443 [Butt v. Great Western Rail. Co., 11 C. B. 140.

An action based upon the custom is in substance in tort, and therefore the plaintiff is entitled to costs notwithstanding the 19 & 20 Vict. 108, s. 30 (repealed by 30 & 31 Vict. c. 142, which is the statute in force), when he recovers less than 201. on a judgment by default, Tatton v. Great Western Rail. Co., 2 E. & E. 844 (see, however, Kerr v. Midland Great Western Rail. Co., 10 Irish C. L. Rep. Appendix XLV.); Baylis v. Lintott, L. R. 8 C. P. 345, 42 L. J. C. P. 119; Fleming v. M. S. & L. Rail. Co., 4 Q. B. D. 81. An action against a railway company for refusing to redeliver goods to an unpaid vendor who has stopped them in transitu is an action of tort, Pontifex v. Mid. Rail. Co., 3 Q. B. D. 23, 47 L. J. Q. B. 28; because the contract of carriage is determined by the stoppage. If goods have been carried under a special contract, the declaration ought in general to be upon such contract, and should not allege a receipt by the defendants as common carriers. See White v. Great Western Rail. Co., 2 C. B. N. S. 7, and Phillips v. Edwards, 4 H. & N. 813. In Simons v. Great Western Rail. Co., 2 C. B. N. S. 620, the defendants were held liable as common carriers, their servants having taken advantage of the plaintiff, and having induced him by a misrepresentation to sign a special contract.]

It is the duty of a carrier not only to carry safely, but also, if no time be stipulated, to carry within a reasonable time; Raphael v. Pickford, 5 M. & G. 551, 6 Scott, N. R. 478 [The Great Northern Rail. Co. v. Taylor, L. R. 1 C. P. 385, 35 L. J. C. P. 210. He is not liable for misdelivery, if in making such delivery he has followed the usual course of business, McKean v. McIror, L. R. 6 Ex. 36].

Questions have arisen as to the time during which the liability of the carrier continues, and there is sometimes considerable difficulty in determining the period at which he ceases to hold the goods in his capacity of carrier, though retaining the control or possession of them. It is for the jury (when there is no written contract) to determine the extent of the agreed transit, as, for instance, in the case of goods carried across a ferry, it is for the jury to determine from evidence of the practice at the ferry whether the owners of the ferry have undertaken to carry goods up a slip, or only to land them on the shore. See Walker v. Jackson, 10 M. & W. 161. [For what constitutes a delivery of cattle, see Rooth v. North-Eastern Rail. Co., L. R. 2 Ex. 173; 36 L. J. Ex. 83; Shepherd v. Bristol and Exeter Rail. Co., L. R. 3 Ex. 189, 37 L. J. Ex. 113.] So where goods are delivered at the office of a railway company to be carried from one terminus to another, it may be inferred by the jury that this company is answerable for the whole transit, though in part on the line of another company. Muschamp v. Lancaster, &c., Rail. Co., 8 M. & W. 421 [Bristol and Exeter Rail. Co. v. Collins, 7 H. of Lords, C. 194, 29 L. J. Exch. 41; Mytton v. Midland Rail. Co., 4 H. & N. 615; and as to passengers, see Blake v. Great Western Rail. Co., 7 H. & N. 987, 31 L. J. Exch. 349; Buxton v. North-Eastern Rail. Co., L. R. 3 Q. B. 549; Thomas v. Rhymney Rail. Co., L. R. 6 Q. B. 266, 40 L. J. Q. B. 89; Hall v. North-Eastern Rail. Co., L. R. 10 Q. B. 437, 44 L. J. Q. B. 164; John v. Bacon, L. R. 5 C. P. 437, 39 L. J. C. P. 365; and compare Wright v. Mid. Rail. Co., L.

R. 8 Exch. 137, 42 L. J. Exch. 89. A railway company may, however, protect itself by a condition from liability for the loss of goods beyond its own line, inasmuch as the Railway and Canal Traffic Act only extends to the traffic on the company's own lines or those worked by it, and such a condition is therefore binding though unsigned, if the employer had the means of knowing it. Zunz v. South-Eastern Rail. Co., L. R. 4 Q. B. 539, 38 L. J. Q. B. 209. The company which actually carries the passenger will be responsible for negligence if it can be inferred that the contract was really made with it though the ticket may have been issued by another company, and if it cannot be inferred that the contract was made with it, still, having received the passenger for carriage, it will be liable for misfeasance, though not for nonfeasance: Foulkes v. Met. Dist. Rail. Co., 5 C. P. D. 157, 49 L. J. C. P. 361.]

When the goods have arrived at the end of the transit, it seems that the carrier is bound to keep them a reasonable time at his own risk for the owner, and it would seem that during the period for which he keeps them under an obligation to do so, springing out of his receipt of them as a carrier, he is subject to the same liability as during their transit. See Hyde v. Trent Navigation Company, 5 T. R. 389. [Shepherd v. Bristol & Exeter Rail. Co., L. R. 3 Exch. 189, 37 L. J. Ex. 113; so in the case of luggage which the passenger has not kept under his own control, the liability of the company does not cease until he has had a reasonable time to take possession of it, Patscheider v. Great Western Rail. Co., 3 Ex. D. 153, and compare Hodkinson v. London & North-Western Rail. Co., 14 Q. B. D. 228, where the passenger had taken possession, but had redelivered her baggage to a porter for safe custody, and the company were held to be freed from liability.] After that period, his extraordinary liability as a common carrier is, it would seem, at an end, and he remains liable only to the same extent as ordinary depositees. See per Lord Abinger, C. B., Cairns v. Robins, 8 M. & W. 258. [Heugh v. London & North-Western Rail., L. R. 5 Exch. 51, 39 L. J. Ex. 48; Chapman v. Great Western Rail. Co., 5 Q. B. D. 278, 49 L. J. Q. B. 420.] Whilst the goods are in the possession of the carrier, he is bound to take proper means for their preservation, and it was even held to be within the scope of the duty of a railway company employed to carry quicks, to plant them, or allow them to be planted in their own land for that purpose. Taff Vale Rail. Co. v. Giles, 2 E. & B. 823,

[If the goods are tendered to the consignee, and he refuses to receive them, it is not, as a matter of law, the duty of the carrier to give the consignor notice of the refusal, but he is bound to do what, under the circumstances, may be reasonable. In Hudson v. Baxendale, 2 H. & N. 575, the defendants, on the refusal by the consignee to receive a puncheon of gin, which the plaintiff had employed them to carry to him, put it into a warehouse, and left it there for two months, without giving notice to the plaintiff. At the end of this period it was found that a portion of its contents was gone. The jury found that the defendants had acted in a reasonable manner, and gave a verdict in their favor, which verdict was subsequently upheld. In Great Western Rail. Co. v. Crouch, 3 H. & N. 183 (affirming 2 H. & N. 491), the carriers took back a parcel, the very next morning after a refusal to receive it, from Plymouth to London, and they were held to be liable for so doing, the jury having found that the parcel was sent back before the expiration of a reasonable time. And see Heugh v. London & North-Western Rail., L. R. 5 Exch. 51, 39 L. J. Exch. 48. In the Great Northern Rail. Co. v. Swaffield, L. R. 9 Exch. 132, 43 L. J. Exch. 89, the defendant who had refused to take delivery of a horse, which he had consigned, addressed to himself, at a station on the plaintiffs' line, was held liable to repay to the plaintiffs the expenses of keeping the horse at livery.]

In Cairns v. Robins, 8 M. & W. 258, goods were sent by a carrier who delivered them to his customer, accompanied by a printed bill, which stated that "any goods that shall have remained three months in the warehouse, without being claimed, or on account of the non-payment of the charges thereon, will be sold to defray the carriage and other charges thereon, or the general lien, as the case may be, together with warehouse rent and expenses." The customer sent them back to the carrier's warehouse to await his orders. They remained there more than a year and then were lost. The customer brought an action, treating the carriers as bailees for reward, and a verdict found for the plaintiff was upheld by the Court of Exchequer, on the ground stated by Alderson, B., in the course of his judgment, that there was evidence from whence the jury might reasonably find, that in consideration that the parties whose goods were carried would pay a certain sum, the defendants would not only carry them, but would warehouse them for three months, the compensation so paid being a compensation not only for carrying, but for warehouse rent also.

In Bourne v. Gatliff, 4 N. C. 314, 5 Scott, 667, 3 Scott, N. R. 1, 3 M. & G. 643, 8 Scott, N. R. 604, 11 Clark & Fin. 45, the duty of a carrier by sea was much considered. It was there holden by the Courts of Common Pleas and Exchequer Chamber, and by the House of Lords, that in the absence of any course of dealing or usage of the port to justify him, a carrier by sea, under a bill of lading of goods to be delivered "at the port of London (all and every the dangers of the sea, &c., excepted), unto Mr. Samuel Gatliff or assigns, on paying for the said goods, freight," &c., was not entitled, immediately on the arrival of the vessel, and without notice to the owner, to land the goods; and that, having so landed them on a wharf where, before coming to the hands of the owner, they were destroyed by accidental fire, the carrier was responsible for their loss. In the same case, upon a plea to the second count, a question arose as to the liability of a carrier by sea, who, for an additional hire, undertakes, after the arrival of the goods, to take care of them at the wharf where they are landed, and to convey them, within a reasonable time, to the place of business of the customer. The Court of Common Pleas held that he was liable for a loss of the goods by accidental fire whilst on the wharf, there being no ground for supposing him to be clothed with one degree of responsibility whilst taking care of the goods at the wharf, and another and different degree whilst carrying the goods from the wharf, inasmuch as both those duties formed part of the same express contract, and were paid for by the same reward; and that court referred to Hyde v. Trent Navigation Company as an authority for their judgment. In the Exchequer Chamber that part of the judgment was reversed, on the ground that the second count did not state an employment of the defendants as common carriers, a point not noticed in the Common Pleas, and the principle acted upon by that court is therefore, perhaps, untouched by the reversal. [On the other hand, a shipowner cannot, after the demurrage days, keep the goods for an unlimited time, and then sue for damages, Erichson v. Barkworth, per Crompton, 3 H. & N. 900, and see Mors le Blanch v. Wilson, L. R. S C. P. 227.1

The sixth and last class of bailments is (according to Lord Holt) mandatum, or a delivery of goods to somebody who is to carry them, or to do something about them, gratis. And this might have been classed under the same head with depositum. For as the keeping, carrying, and working upon goods for hire are all included, both by Lord Holt and Sir W. Jones, under the same head, there seems no good reason why the keeping, carrying, and working upon them gratuitously should not have been so likewise. Certain it is that the liabilities of the depositary and of the mandatary are precisely the same; both (in the

absence, at least, of a contract, in special terms) are bound to slight diligence, and to slight diligence only, and liable for nothing short of gross negligence, the reason in each case being the same, namely, that neither is to receive any reward for his services. Accordingly, whenever the extent of a mandatary's liability is discussed we find the cases respecting that of depositaries cited, and relied upon, and so vice versâ. The cases of Beauchamp v. Powley, 1 M. & Rob. 38; Shiells v. Blackburne, 1 H. Bl. 158; and Dartnall v. Howard, 4 B. & C. 345, the facts of which are respectively stated at the commencement of this note, were decisions on the responsibility of mandataries, and from those, as well as from the general principle, it appears that such bailees are liable for gross negligence, and for that only. [Moffatt v. Bateman, L. R. 3 P. C. 115.]

A gratuitous agent is, however, bound to use such skill as he possesses; for instance, a person who rides a horse gratuitously at the owner's request for the purpose of showing him for sale, if proved to be a person skilled in the management of horses, is held equally liable with a borrower for injury sustained by the horse whilst ridden by him, Wilson v. Brett, 11 M. & W. 113. [And this, as before pointed out, is not a real exception to the rule that gratuitous bailees are liable for gross negligence only, since, in the case of a skilled person, that may well be considered gross negligence which in an ordinary unskilled person would be only a slight want of care.]

As to what amounts to such an undertaking of a gratuitous office or employment as will impose a liability to fulfil its duties, see *Elsee* v. *Gateward*, 5 T. R. 143; *Balfe* v. *West*, 13 C. B. 466 [and *Fish* v. *Kelly*, 17 C. B. N. S. 194].

From the above cursory view of the law of bailments, it will be seen that, besides the six classes enumerated by Lord Holt, bailees may be distributed into three general classes, varying from one another in their degrees of responsibility. The first of these is, where the bailment is for the benefit of the bailor alone: this includes the cases of mandataries and deposits, and in this the bailee is liable only for gross negligence. The second is, where the bailment is for the benefit of the bailee alone: this comprises loans, and in this class the bailee is bound to the very strictest diligence. The third is, where the bailment is for the benefit both of bailor and bailee; this includes locatio rei, vadium, and locatio operis, and in this class an ordinary and average degree of diligence is sufficient to exempt the bailee from responsibility.

A bailee dealing negligently with goods intrusted to him does not thereby necessarily lose his character of bailee so as to be liable as for a conversion, see Heald v. Carey, 11 C. B. 977. Contra if he commits an active wrong which determines the bailment, Clark v. Gilbert, 2 N. C. 356; Cooper v. Willomatt, 1 C. B. 672. See Austin v. Manchester, &c., Rail. Co., 10 C. B. 454 [Fenn v. Bittlestone, 7 Exch. 152; Chinery v. Viall, 5 H. & N. 288; Johnston v. Stear, 15 C. B. N. S. 330, 33 L. J. C. P. 130; Mulliner v. Florence, 3 Q. B. D. 484. Replevin will not lie at suit of the bailor against a person to whom the bailee has delivered the goods. Mennie v. Blake, 6 E. & B. 842.

In the case of Blakemore v. Bristol & Exeter Rail. Co., 8 E. & B. 1035, Mr. Justice Coleridge, delivering the judgment of the court, made some valuable remarks on the duty of the gratuitous lender of a chattel to disclose defects in it of which he is aware. "It is surprising," said the learned judge, "how little in the way of decision in our courts is to be found in our books upon the obligations which the mere lender of a chattel for use contracts towards the borrower. Pothier, in his Traité du Prêt à Usage, to be found in the 4th vol. of his works by Dupin, pt. 3, pp. 37 to 42, enters into the subject at some length; and Story also treats of it, Bailment, s. 275. The principles which these two writers draw, mainly from the Roman law, may be the more safely relied on as engrafted into

the common law, considering that the whole of this branch of our law is so mainly built on the Roman, as the judgment in Coggs v. Bernard demonstrates. It may, however, we think, be safely laid down that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. Adjuvari quippe nos, non decipi, beneficio oportet, is the maxim which Story borrows from the Digest; and Pothier is express to the same effect, citing, as Story does also, the instance, Qui sciens vasa vitiosa commodavit si ibi infusum vinum, vel oleum corruptum effusumve est, condemnandus eo nomine est. This is so consonant to reason and justice, that it cannot but be part of our law. Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? The principle laid down in Coggs v. Bernard, and followed out by Lord Kenyon and Buller, J., and by Lord Tenterden in the Nisi Prius cases cited in the note, 1 Lea. Ca. 162 (4th ed.), that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By the necessarily implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him." See also McCarthy v. Young, 6 H. & N. 329, 30 L. J. Exch. 227. And as to the analogous duty upon the sender of goods by a carrier to communicate their dangerous nature, see Farrant v. Barnes, 31 L. J. C. P. 137; also as to the duty of the letter in contracts of hiring to supply a thing reasonably fit for the purpose for which it is intended, see Sutton v. Temple, 12 M. & W. 60; Fowler v. Lock, L. R. 7 C. P. 272, 41 L. J. C. P. 99, L. R. 10 C. P. 90; Stanton v. Richardson, L. R. 9 C. P. 390; and compare Readhead v. Midland Rail. Co., L. R. 4 Q. B. 379, 38 L. J. Q. B. 169; Francis v. Cockerell, L. R. 5 Q. B. 184, 501, 39 L. J. Q. B. 113, 291; Hyman v. Nye, 6 Q. B. D. 585; Robertson v. Amazon, &c., Co., 7 Q. B. D. 598, 51 L. J. Q. B. 68.

By the 24 & 25 Vict. c. 96, s. 3, any person who, being a bailee of any property, fraudulently takes or converts it to his own use or the use of any person other than the owner, is to be deemed guilty of larceny, although he do not break bulk or otherwise determine the bailment. A person who has received money from another, and is only bound to return the amount, not the identical coins, is not a bailee within this section, Reg. v. Hassall, 30 L. J. M. C. 175; it was doubted (before the passing of the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, s. 1) whether a feme covert could be so; Reg. v. Robson, 31 L. J. M. C. 22; but it is now decided that an infant may be, Reg. v. Macdonald, 15 Q. B. D. 323; see further as to who is a bailee within the section, Reg. v. Bunkall, 33 L. J. M. C. 75; R. v. Ashwell, 16 Q. B. D. 190, 55 L. J. M. C. 65.]

No case better deserves the appellation of a "leading case" than Coggs v. Bernard; for in Lord Holt's celebrated opinion here pronounced we reach (A. D. 1703) the fountain-head of our English law of bailments. Prior to this, but a few scattered statements are to be found in the books of law, nor are they always made accurately. Coke, First Inst. 89 a, 89 b; Bro. Abr. (A. D. 1576); Rolle Abr. (A. D. 1668), tit. "Bailment." Young, comparatively, as this branch of our jurisprudence must be considered, it acquires, nevertheless, at the present day a marked prominence, chiefly through the development of our pledge or collateral security as a mercantile transaction and the prodigious expansion of the carrier business since the introduction of inland transportation by means of railways. Until the nineteenth century had passed its first quarter, litigation under our present head seldom arose, and the topic of law had for the most part a trivial application, except in carriage by water, which had its peculiar title as the "law of shipping."

"Bailment" is one of those few topics of jurisprudence whose title suggests nothing clear to the mind of the layman; but, as the word itself, which is of French origin, literally imports, a delivery or the placing of something in another's hands is the cardinal idea of the transaction. In other words, it relates to personal property or movables, and, like the law of sale or gift in such connection, it contemplates personal property from the point of a transfer, or one's rights and duties by virtue of a title. But the sale or the gift of a thing involves a transfer of property, therein carrying a perfect title; while in the bailment one has only possession and the right of possession, with no full property. The holder of the chattel has no more than what is called a special property or interest in it, a temporary right; there is possession severed from the ownership. Thus, a wagon may be sold or given to me, and there is more than a bailment; but if I have the wagon to store, transport, or repair it, or by way of pledge, or as a borrower or hirer of it, in all such instances I am no owner but the bailee of the thing. We need not be surprised that definitions of "bailment" have in the past been hard to frame, or that American writers so eminent as Kent and Story have differed in the scope to be assigned to the subject. Perhaps the most fitting of modern definitions which this writer finds in the books is this:

A delivery of some chattel by one party to another, to be held according to the special purpose of the delivery, and to be returned or delivered over when that special purpose is accomplished. Bouy. Dict. Bailment, citing Prof. Joel Parker. This is a neat and concise definition, and conforms very fairly to the term "bailment" itself. But this writer finds such a scope too narrow to meet a number of instances which are properly referred to this branch of the law, and where there is no strict "delivery," as in the case of a finder, of a captor or salvor, of an attaching officer, of a person selling goods and retaining possession for the new owner, and the like; for while bailment imports literally a delivery, the rights and duties fasten rather upon a possession acquired by the person in question, than upon any contract or delivery. Hence we may essay this new definition of our own: that bailment consists in the holding of a chattel by some party, under an obligation to return or deliver it over after some special purpose is accomplished. Schouler, Bailm. §§ 1, 2, 2d ed.

This bailment principle runs deep, and much has been written about constructive bailees. One, in fact, can hardly hold a chattel in trust without subjecting himself pro tanto to the operation of the law of bailments; but there is this limitation imposed by our definition, that in every bailment a final return or delivery over of the specific thing is ultimately intended. A trustee or administrator may invest, reinvest, reduce to cash, change in various ways the identity of the chattels or the fund; hence he does not continue a simple bailee. Mutuum, or a sale of equivalents with or without an option, constitutes no bailment: there is here a change of property in the thing; and so, too, a general deposit of money at a bank, whereby the bank becomes indebted to return an equivalent amount of money, constitutes no bailment, whereas a special deposit — as of plate, jewelry, a trunk, or a sealed package — would render a bank a bailee, for the same specific property is to be returned or accounted for. Distinctions like these often arise; as in case of selling under an option or on trial, or selling subject to the buyer's further orders; in such a situation the chattel may be attached by creditors or destroyed, and we then inquire whether the person in possession owned it or was merely a bailee for the true owner. Schoul. Bailment, §§ 6-9, 2d ed.

The true classification of bailments is at the outset of our inquiry. Mr. Smith, in his English note to this case, is seen to set forth six classes, as enumerated by Lord Holt, and to prefer them to the division made by Sir William Jones in his Treatise on Bailments (A. D. 1781). Mr. Justice Story, in his better treatise of this century, follows essentially the same division; Blackstone, in his Commentaries, touching the subject too lightly to produce an impression. Story, Bailm. § 8; 2 Bl. Com. 451. We shall venture, however, the criticism that this division is altogether too casual and capricious; and that the only sure classification of the law of bailments is under these three heads: (1) Those for the sole benefit of the party on the bailor's side; (2) those for the sole benefit of the party on the bailee's side; (3) those for the benefit of both parties. This division the writer has pursued in his treatise and in the present note. See Schoul. Bailm. § 14. Judge Story himself has suggested that such a grouping might be better; Story, Bailm. § 3. And the reader should observe that Lord Holt made his own exposition with so little satisfaction over his own classification as to express a doubt whether he had settled or unsettled the law in point. See supra, p. 368. Our idea is that the standard of care and diligence on a bailee's part - which is the main concern of the law pertaining to this subject — is graded at the common law by the consideration of recompense. To make this plainer, we set forth the following chart, which exhibits the old and new methods of classification side by side: -

I. BAILMENTS FOR THE BAILOR'S SOLE BENE-FIT.

cial purposes of such bailments more particularly: -

Including among the spe- Or, under the old method of classification: -

- (a) The gratuitous taking (a) Depositum. of a thing on deposit; (b) the gratuitous per- (b, c) Mandatum. formance of work upon a thing; (c) the gratuitous carriage of a thing from place to place.

II. BAILMENTS FOR THE BAILEE'S SOLE BENE-FIT.

- (d) The lending of a thing; (d) Commodatum. i. e., practically for its temporary enjoyment by the borrower.

All of the foregoing are sometimes styled gratuitous bailments.

III. ORDINARY BAIL-MENTS FOR MUTUAL BENEFIT.

IV. EXCEPTIONAL BAIL-

MENTS.

on deposit for reward;

- work upon a thing for reward; (c) the carriage (c) Locatio operis merof a thing from place to place on reward; (d) (d) Locatio rei. the hiring of a thing, i.e., for temporary enjoyment; also (e) the pledge (e) Pignus. or pawn of a thing.
- (a) Postmasters.
- (b) INNKEEPERS.
- (c) COMMON CARRIERS.

- (a) The taking of a thing (a) Locatio custodia.
 - (b) the performance of (b) Locatio operis faciendi.
 - cium vehendarum.

 - (a, c) A branch of Locatio operis mercium vehendarum.
 - (b) A branch of Locatio custodiæ.

Now, to apply the standard of care and diligence towards the personal property in question — for bailment rights and duties fasten in rem — the elementary principle is that, independently of some act of legislation, or of special contract by which the parties have expressly regulated the matter for themselves consistently with public policy, a bailee's care and diligence must be according to the recompense intended by the transaction. Here, then, is the standard for each class of bailments: -

> The measure of care and And the measure of negdiligence exacted of the bailee is:-

ligence for which he becomes answerable is:

- I. In bailments for the = Slight. bailor's sole benefit.
- = Gross (or more than ordinary).
- II. In bailments for mut- = Ordinary. ual benefit.
- = Ordinary.

bailee's sole benefit.

III. In bailments for the = Great (or more = Slight. than ordinary).

ments (Postmasters, Innkeepers, Common Carriers).

IV. In exceptional bail- = An Exceptional Responsibility. (Approximating insurance in the two latter instances.)

This standard, we should observe, suits common-sense men to regulate their conduct by, and a common-sense jury to compel justice. We need not pretend that this test is above logical criticism. Diligence, or even negligence, is here used in a comparative, not an absolute sense. Some writers and jurists show a tendency to break away from such divisions and make the test of negligence what others should have done under the like circumstances. But in bailment cases, at least, the courts very consistently adhere to the gradation of slight, ordinary, and

great, which we have stated. The advantage of our standard consists in its use for comparison, for generalizing well the mutual expectation where, as generally happens, the parties have not made their original intent explicit or shown clearly an intent to frame their own standard for the case within the permitted limits of public policy. If this generalization is to be dropped, one falls most consistently into a contempt of all standards, so as to make each case a special issue of actual intent; Schoul. Bailm. §§ 15, 16.

Honesty and good faith, we may add, are required of all bailees. A tortious possessor of a thing, one who holds it without color of a right, is absolutely responsible for its safety: and such a possessor is perhaps to be pronounced no bailee within our definition. One who possesses a thing, on the other hand, without at all becoming aware of it, is not responsible for its safety; he is no bailee; as, if one should put a box surreptitiously into my wagon, for some purpose of his own. But it may happen either that one who is a rightful bailee becomes by his breach of trust a wrongful possessor, or that one who had something wrongly thrust upon him, and was no bailee, became aware that he had it, and so by his knowing conduct acquired the full position of bailee towards the thing.

The bailment need not be by the full owner of the thing; Tancil v. Seaton, 28 Gratt. 601. It may be by a duly authorized agent; Lloyd v. Barden, 3 Strobh. 343; Foster v. Essex Bank, 17 Mass. 479, 497. Even if the bailor's possession were wholly without right, the bailee receiving the thing in good faith would incur the usual incidents, subject to adverse claims of the proper parties duly made upon him.

We shall now consider the law of bailments in detail, citing only American cases by way of supplementing the English note which precedes, but using our own foregoing mode of classification, to which the English cases also are easily conformable.

1. Bailments for the bailor's sole benefit; that is to say, the *Depositum* and *Mandatum* of Lord Holt's classification. Under this head is included the gratuitous custody, or work upon, or carriage, of a chattel; all for the bailor's sole benefit. This embraces, too, a bailment for the benefit of some third person at the request of the bailor, as, for instance, a free transportation

not so much for the consignor's as for the consignee's advantage; Fay v. Steamer New World, 1 Cal. 348; Michigan Central R. v. Carrow, 73 Ill. 348.

There can be no arbitrary classification under this head. Workmen, artisans, agistors, warehousemen, wharfingers, factors, even carriers, if they gratuitously undertake the service, are bailees of this class. Cases supra. But if the goods are placed in the bailee's possession without his knowledge or consent, there is no contract of bailment; Michigan Central R. v. Carrow, 73 Ill. 348; 1 Cal. 348; Green v. Birchard, 27 Ind. 483; Foster v. Essex Bank, 17 Mass. 479; aliter if the bailee, however, upon ascertainment of the fact, should go on with the trust. The bailment relation may arise where the undertaking is not strictly upon contract, as in the case of finders of property, intermeddlers, attaching officers, or stakeholders. Finders of property upon land are gratuitous bailees, having no legal right of salvage; Wentworth v. Day, 3 Met. 352; Marvin v. Treat, 37 Conn. 96; Mill Creek Township v. Brighton Stock Yards Co., 27 Ohio St. 435; Bobo v. Patton, 6 Heisk. 172. As to intermeddlers, see Bayon v. Prevot, 4 Mart. 58; Goodenow v. Snyder, 3 Iowa 599. Attaching officers are quasibailees; although it may be questioned whether the bailment be one with or without recompense; Burke v. Trevitt, 1 Mason 96; Cross v. Brown, 41 N. H. 283; State v. Fitzpatrick, 64 Mo. 185; Harrington v. King, 121 Mass. 269; 104 Mass. 104; Blake v. Kimball, 106 Mass. 115; Thayer v. Hutchinson, 13 Vt. 504. The New York rule regards the bailment as, in effect, one for hire. See Phelps v. People, 72 N. Y. 334. As to a stakeholder, like considerations apply; also to the payment of money into court pending controversy, when, according to the safer practice, it is to be kept by the clerk as a specific, and not a general deposit. See Mott v. Pettit, 1 N. J. L. 298; Western Marine and Fire Ins. Co. in re, 38 Ill. 289. Contra, Aurentz v. Porter, 56 Penn. St. 115.

Whether the bailment is a gratuitous one is a question of fact, to be submitted to the jury; 4 Thomp. & C. (N. Y.) 96; Lobenstein v. Pritchett, 8 Kans. 213; Mariner v. Smith, 5 Heisk. 203; Kinchelo v. Priest, (Mo.) 1 S. W. 235. Where the course of business or the business usage is to charge for services, a mere silent determination to make no charge does not constitute a person a bailee without reward; Second Nat. Bank v.

Ocean Nat. Bank, 11 Blatchf. 362. In short, an undertaking in the line of one's usual business may be presumed upon recompense, and one outside such line gratuitous. But attendant circumstances may warrant the presumption that the undertaking was in fact gratuitous; Dart v. Lowe, 5 Ind. 131. See 12 La. Ann. 119.

All kinds of personal property, including incorporeal chattels whose muniments of title are capable of delivery, may be gratuitously bailed; Schouler, Bailm. 2d ed. § 31.

Delivery, or at least a holding of possession, is essential to a bailment. Upon a transfer of possession with all its accompanying temporary rights, the rights of the parties to the bailment become fixed. But before delivery the gratuitous undertaker is not liable if he fails to make himself a bailee according to his naked promise; Thorne v. Deas, 4 Johns. 84; 11 Abb. N. Y. Pr. N. S. 344. In short, we distinguish between bailment and the contract for a bailment in all cases; the latter, while resting on gratuitous promise only, may be broken with impunity; while the bailment, once undertaken, must be carried out. Surrender of possession by the bailor, indeed, upon the faith of the bailee's undertaking, furnishes a contract consideration sufficient to support even a gratuitous bailment; Mariner v. Smith, 5 Heisk. 203; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278.

The rule of the gratuitous bailee's responsibility is well illustrated in the interesting case of Tracy v. Wood, 3 Mason 132. See also Foster v. Essex Bank, 17 Mason 479; Griffith v. Zipperwick, 28 Ohio St. 388. There must be slight care bestowed, or an absence of gross negligence, according to the circumstances of the transaction. There may be less than ordinary care, provided there be some care, enough to be called slight; National Bank v. Graham, 100 U.S. 699; Whitney v. Brattleboro' Bank, 55 Vt. 154, 161; Carrington v. Ficklin, 32 Gratt. 670. Gross negligence is still the test approved by our courts in bailment cases, although that term is frequently criticised as unphilosophical; Spooner v. Mattoon, 40 Vt. 300; Tompkins v. Saltmarsh, 14 S. & R. 275; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278; Gulledge v. Howard, 23 Ark. 61; Griffith v. Zipperwick, 28 Ohio St. 388; McKay v. Hamblin, 40 Miss. 472; Scott v. Nat. Bank of Chester Valley, 72 Penn. St. 471; Smith v. First Nat. Bank, 99 Mass. 605. See also 141 Mass.

492, 531. Gross negligence is of course a relative term; 91 U. S. 494; and it is, perhaps, more logical to use the correlative expression, slight diligence.

If the bailee takes as good care of the property as of his own, this raises a presumption of diligence on his part, and is almost conclusive of good faith; Foster v. Essex Bank, 17 Mass. 479, 499; First Nat. Bank v. Graham, 79 Penn. St. 106, 118; Bronnenburg v. Charman, 80 Ind. 475. But it raises no more than a presumption. See Tracy v. Wood, 3 Mason 132, where the gratuitous bailee was very careless of his bailor's money and his own. Cf. Bland v. Womack, 2 Murph. 373. The true test of responsibility appears to be based upon the mutual understanding of the parties, or what they had a right to expect under the circumstances. Schouler, Bailm. 2d ed. §§ 37, 38, 46.

Upon these principles a bank is held liable for neglect to make presentment in season to charge the indorser of a note received by it for collection; Bank of Utica v. M'Kinster, 11 Wend. 473. One is also liable for the grossly careless and unauthorized transmission of money or other property; Stewart v. Frazier, 5 Ala. 114; 11 Wend. 25; Ferguson v. Porter, 3 Fla. 27; Jenkins v. Bacon, 111 Mass. 373. Or for needless exposure of the property under circumstances which would tempt men to steal; Colyar v. Taylor, 1 Cold. 372; Tracy v. Wood, 3 Mason 132. For instances in which the bailee was held to have exercised the requisite care, see Eddy v. Livingston, 35 Mo. 487; Montgomery v. Evans, 8 Ga. 178; 3 Iowa 599; Fulton v. Alexander, 21 Tex. 148; Kirtland v. Montgomery, 1 Swan 452; Bérard v. Boagni, 30 La. Ann. 1125. As to the requisite care in the collection of rents without reward, see Bronnenburg v. Charman, 80 Ind. 475. See also Eldridge v. Hill, 97 U. S. 92; 6 Wall. 420; Patterson v. McIver, 90 N. C. 493; 32 Minn. 105. There is a line of decisions affecting the liability of banks of general deposit for the valuables of their customers taken in custody without reward; Foster v. Essex Bank (A. D. 1821), 17 Mass. 479; 99 Mass. 605; Scott v. Nat. Bank, 72 Penn. St. 471. And as to due care in keeping or carrying property, see Schermer v. Neurath, 54 Md. 491; Carrington v. Ficklin, 32 Gratt. 670; Caldwell v. Hall, 60 Miss. 330; Spooner v. Mattoon, 40 Vt. 300.

The gratuitous bailee may make special stipulations, but not so as to exempt himself from liability for gross negligence, nor in general transcend the bounds of public policy; Pattison v. Syracuse Nat. Bank, 4 Thomp. & C. (N. Y.) 96. The bailor and the bailee are alike bound by special terms; Trowbridge v. Schriever, 5 Daly (N. Y.) 11. The bailee may thus enlarge his liability by special agreement; Clark v. Gaylord, 24 Conn. 484; though such intention should not be inferred from doubtful expressions; Whitney v. Lee, 8 Met. 91; Maury v. Coyle, 34 Md. 235; Wright v. Paine, 62 Ala. 340.

A gratuitous bailee has, from the nature of the transaction, no beneficial use of the thing bailed to him. His attempt to sell, pledge, or give it away, or in any way to assume ownership of the thing, amounts to a conversion. See King v. Bates, 57 N. H. 446; Dale v. Brinckerhoff, 7 Daly 45. Such a conversion is a virtual termination of the bailment, and the bailor may bring trover for repossession; King v. Bates, supra; Crump v. Mitchell, 34 Miss. 449. But the conversion does not, of itself, sever the bailment, relative to the injury of the bailor. See McMahon v. Sloan, 12 Penn. St. 229.

A gratuitous bailee may charge the bailor with necessary expenses about the thing in the direct line of his undertaking; 64 Barb. 617; 12 La. Ann. 672. By virtue of his possession, moreover, the bailee without reward, like other bailees, may sue in tort third parties who invade his rights; Shaw v. Kaler, 106 Mass. 448; Harrington v. King, 121 Mass. 269. A mere finder has this right; but as to whether trover lies in his favor, see Schouler, Bailm. § 54.

If the agreement for this gratuitous bailment was for no definite time or purpose, the bailment may be terminated by either party, at any time he sees fit, upon demand or due notice, as the case may be; Roulston v. McClelland, 2 E. D. Smith (N. Y.) 60; 3 Hill (S. C.) 284; 22 Barb. 314; Montgomery v. Evans, 8 Ga. 178; 30 Ark. 428; Stewart v. Frazier, 5 Ala. 114; Jackman v. Partridge, 21 Vt. 558. A gratuitous bailee must not sell the property if the bailor, after due notice to him, neglects to remove it, but he may store it at the bailor's expense; Dale v. Brinckerhoff, 7 Daly 45. The bailor may even countermand his order to give the thing to a third person, unless the bailee has already entered into privity with such third party, or his own indemnity will be prejudiced thereby; Beardsley v. Richardson, 11 Wend. 25; Winckley v. Foye, 33 N. H. 171.

Delivery at the end of the bailment, in such cases, is generally to the bailor, though it may, according to the contract or the circumstances of the case, be to some third person. A stakeholder, or a bailee who holds under a sort of sequestration, as, for instance, a clerk holding money paid into court, or a sheriff with attached goods, is obliged to exercise discretion as to the proper party entitled to receive the property from him; Carle v. Bearce, 33 Me. 337; State v. Fitzpatrick, 64 Mo. 185. Where some third party claims the thing as the true owner, the bailee cannot safely disregard the claim, if asserted in due season; and here he may either refuse delivery and call in the bailor to defend the claimant's suit, or, better still, may interplead bailor and claimant, leaving a court of equity to investigate and determine the true title; Cook v. Holt, 48 N. Y. 275. As a universal rule, however, delivery to the rightful party will exonerate every bailee who received possession, with honest intent, from a wrongful party. On the other hand, a delivery in fact and in good faith, in accordance with his undertaking, before notice of an adverse claim, will protect him; Nelson v. Iverson, 17 Ala. 216; 34 La. Ann. 1133. See Brown v. Thayer, 12 Gray 1; Dewey v. Field, 4 Met. 383; Dodge v. Meyer, 61 Cal. 405; Dickson v. Chaffe, 34 La. Ann. 1133; Brant v. McMahon, 56 Mich. 498. And if the bailee can show that by judicial proceedings, of which the bailor had due notice, or to which he was properly made a party, the surrender to another was compelled, the bailor cannot hold him responsible; Cook v. Holt, 48 N. Y. 275; Magdeburg v. Uihlein, 53 Wisc. 165. See also Roberts v. Noves, 76 Me. 590; Chattahoochee Nat. Bank v. Schley, 58 Ga. 369. The bailee should set up no technical, dishonest, or pretentious plea, in derogation of his duty by his bailor; Hendricks v. Mount, 5 N. J. L. 738; 68 Me. 425; 53 Wisc. 165.

The death of the bailee without reward gives the bailor a right to repossess himself of his property at once; Smiley v. Allen, 13 Allen 465. For nothing but a bailee's possible lien for reimbursement, or $jus\ tertii$, can obstruct a bailor under these circumstances.

If the thing is not produced at all when the bailment is terminated, or if it is returned damaged, the bailee ought, upon request, to give a satisfactory account therefor, or else stand liable civilly, and perhaps criminally, for the consequences;

Graves v. Ticknor, 6 N. H. 537. If he shows that it was lost or injured under circumstances imputing to him no want of slight diligence, he is of course absolved. In no other sense can the mere gratuitous bailee be required to render an account. See Schouler, Bailm. § 64.

2. Bailments for the bailee's sole benefit. — This class consists of the Roman commodatum, our gratuitous loan for use. This bailment may be defined as one for the temporary beneficial use, gratis, of a chattel which the borrower must afterwards return. The Roman law distinguished commodatum from mutuum. The term mutuum was applied to a loan for an equivalent, where the borrower was bound to redeliver, not the specific thing furnished him, but, at his option, some other of the same kind. This latter transaction, however, is no bailment at all at the common law, but is included in the law of sales. See Fosdick v. Greene, 27 Ohio St. 484, supra, p. 400. Yet there may be a present lending with an option in the borrower to purchase hereafter; 10 Daly 214. And generally there may be a present bailment which the exercise of an option would turn into a transfer of ownership. Commodatum, on the other hand, which contemplates the specific return or delivery over of the thing loaned, is a strict bailment. The cases are few, in either English or American courts, which present this class of these bailments.

This gratuitous loan for use arises upon a contract of some kind; for the assent of the bailor, express or implied, is a necessary ingredient. Taking a thing without permission does not constitute a bailment, and any wrongdoer, under a pretence of borrowing, is absolutely responsible for the thing he has taken, and, if he meant to appropriate, may be indicted for larceny; State v. Bryant, 74 N. C. 124.

As to subject-matter, any kind of personal property may be thus loaned. There is a distinction made between a loan of things consumable in their use, like wine or corn, which under our law amounts ordinarily to a gift, or, if to be replaced in kind, to a mutuum (or sale of equivalents); and a loan of things not consumable, where the bailee has the beneficial use alone. Yet even consumable things might be loaned to be specifically returned, as, for instance, a stock of wine or corn to show off and enhance the bailee's credit. See Archer v. Walker, 38 Ind. 472. As for the period of the loan, this may have been

definitely fixed in advance, or the loan may be for some indefinite time, or during the will of the lender; to which latter loan the Romans gave the name *precarium*. Whether our courts would thus distinguish, see Schouler, Bailm. 2d ed. §70.

A bare promise to lend, on the one side, and to borrow, on the other, is not binding before delivery of the thing; Thorne v. Deas, 4 Johns. 84. Here, as before, we distinguish a mere contract for a bailment from the bailment itself.

To consider the responsibility of the borrower: The highest degree of diligence known to the law is here required, because the bailee is the sole person deriving any benefit from the bailment. He is not, however, an insurer of the property. Such diligence as one more than ordinarily careful would bestow upon his own property under like circumstances appears to be the criterion. He must bestow great care and diligence, and is responsible for even slight negligence; Fortune v. Harris, 6 Jones 432; 5 Dana 173; Scranton v. Baxter, 4 Sandf. (N. Y.) 5; 7 Ind. 155; Bennett v. O'Brien, 37 Ill. 250; 78 Ill. 40; Beller v. Schultz, 44 Mich. 529.

Good faith, of course, is required of the borrower. For loss or damage to the property caused by a deviation from the strict terms of the bailment, he is answerable; as if a horse is borrowed for one purpose and used for another; Kennedy v. Ashcroft, 4 Bush 530; Martin v. Cuthbertson, 64 N. C. 328; 17 N. Y. Supr. 474; Lane v. Cameron, 38 Wisc. 603; Cullen v. Lord, 39 Iowa 302; Stewart v. Davis, 31 Ark. 518. Of course, the bailee is answerable as a wrongdoer, in case he attempts to sell, pledge, or give it away; McMahon v. Sloan, 12 Penn. St. 229; Crump v. Mitchell, 34 Miss. 449.

But if the bailee is not guilty of even slight negligence, the consequences of loss of or injury to the property, by inevitable accident or mischance, must be borne by the lender or owner; Fortune v. Harris, 6 Jones 532; Carpenter v. Branch, 13 Vt. 161; 7 Ind. 155; Watkins v. Roberts, 28 Ind. 167; 10 Daly 214. Yet if the bailee carelessly or wilfully exposed the thing to the hazard of such a loss, and failed to use great diligence to avert or reduce the calamity, his remissness of duty is held to be the occasion of the loss or damage; Beller v. Schultz, 44 Mich. 429. The lender's intervention to remedy the mischief does not release the borrower from his proper liability; Todd v. Figley, 7 Watts 542. As to a borrower's liability for loss

or injury occasioned by third persons, see Scranton v. Baxter, 4 Sandf. 5.

This bailment, like others, is affected by a special contract within the range of public policy. Thus, the borrower may expressly assume the risks of an insurer. See Archer v. Walker, 38 Ind. 472. The evidence of such special contract should be clear; Watkins v. Roberts, 28 Ind. 167.

While, too, this bailment is for beneficial use, the lender may impose reasonable restrictions to such use. Generally speaking, the gratuitous loan is regarded as so far personal that strangers should not be allowed to participate in the use; Scranton v. Baxter, 4 Sandf. 5; Wilcox v. Hogan, 5 Ind. 546. The bailee may be presumed answerable for ordinary expenses incidental to preserving the chattel, while in actual use, such as feeding and sheltering a borrowed horse, and this liability for expenses does not change the gratuitous nature of the bailment; Bennett v. O'Brien, 37 Ill. 250; but cf. Chamberlin v. Cobb, 32 Iowa 161. The lender ought to bear the burden of any extraordinary expense in preserving the thing to him.

The bailee may sue third parties who interfere with his possession, in trespass or in trover; Dumas v. Hampton, 58 N. H. 134. This follows our general rule. But the borrower's interest is, after all, very slight; and if the lender may terminate the loan at pleasure, he may sue third parties in his own name as by virtue of such termination; Orser v. Storms, 9 Cow. 687.

Termination of the bailment. This bailment is commonly terminable at the bailor's pleasure. In the absence of stipulations for a definite period of time, a reasonable period for use is all a borrower should expect; Clapp v. Nelson, 12 Tex. 370; 5 Dana 173. But whether one who lends for a fixed time can utterly disregard the stipulation, and put an end to the loan at pleasure, is not clearly settled; Schouler, Bailm. §§ 70, 81. No demand by the bailor is necessary, before a suit to recover, unless there be an uncertainty as to whether the bailment has expired; but if there be an uncertainty, he should first demand; Clapp v. Nelson, supra; Ross v. Clark, 27 Mo. 549. A wrongful transfer by the bailee terminates the bailment, and the bailor may pursue the thing as his own against all third parties, save so far as the usual rule of a countervailing equity applies; 7 Cow. 752; Esmay v. Fanning, 9 Barb. 176; McMahon v. Sloan, 12 Penn. St. 229; Crump v. Mitchell, 34 Miss. 449.

Delivery back or over is here to the lender or his order; Simpson v. Wrenn, 50 Ill. 222; Nudd v. Montanye, 38 Wisc. 511. See Lain v. Gaither, 72 N. C. 234. As to the effect of a borrower's or lender's death, see Smiley v. Allen, 13 Allen 465; Schouler, Bailm. § 82. The borrower may not exercise his own option, nor set up an adverse title, unless the rightful owner puts him in legal jeopardy, or he is forcibly dispossessed. The Idaho, 93 U. S. 575; Watkins v. Roberts, 28 Ind. 267. If in real default about returning the thing at the proper time, the bailee becomes absolutely liable, like a wrongdoer. Stewart v. Davis, 31 Ark. 516. The place of redelivery is to be ascertained from the special circumstances of the transaction. Esmay v. Fanning, 9 Barb. 176, favors regarding the lender's residence as the place of redelivery.

3. Ordinary bailments for mutual benefit. — We are led now to speak of the bailment for hire in general. This bailment may be defined generally as one in which recompense is to be given either for services about a chattel or for the temporary use of a chattel; locatio-conductio was the term applied by the Roman law in this connection. We include: (1) hired services about a chattel, (2) the hired use of a chattel, (3) pledge or pawn. Pledge or pawn is a unique transaction of a business character; but the other two classes correspond to those we have already considered; only that what before was gratuitous on one side has now a mutual consideration or recompense.

Three things are essential to a bailment for hire: - (1) A chattel or chattels as the subject-matter. Any kind of personal property which is in existence as such at the time may be thus bailed; even things incorporeal if they have some muniment of title capable of delivery, to represent the money right. (2) A recompense. Where not definitely fixed, there may be an understanding that the customary charge under such circumstances shall be made. But, be it express or implied, there is here some mutual benefit contemplated. It is not necessarily in money. Parker v. Marquis, 64 Mo. 38; Chamberlin v. Cobb, 32 Iowa 161; Francis v. Shrader, 67 Ill. 272. A horse let out for its keep, for instance, is a bailment of this class. Even a contingent and indirect benefit, such as the opportunity of getting more business, is a sufficient recompense; Newhall v. Paige, 10 Gray 368. See Carpenter v. Branch, 13 Vt. 161. (3) Mutual assent to accomplishing a specific bailment purpose towards such chattel or chattels, for the specific recompense. Schouler, Bailm. § 91. In these three essentials we have something analogous to that of which writers discourse under the contract of sale. Benj. Sales, bk. 1, pt. 1, c. 3.

The contract of hire must be for a lawful purpose. The modern rule for all contracts tainted with illegality applies here. Frost v. Plumb, 40 Conn. 111. As soon as the contract for the bailment of hire is complete, the parties acquire mutual rights and duties, which are enforceable because of the mutual consideration. See Thorne v. Deas, 4 Johns. 84. Yet, as before, there is no bailment transaction until that delivery takes place which obligates the bailee to duly deliver back or over.

There are certain bailments for reward which do not arise upon a strict contract and mutual terms. Bailees of this kind are salvors at sea, lawful captors of a vessel, finders on land where a reward has been offered, and all sheriffs, clerks, and other officers who are recompensed out of the thing, and not mere gratuitous custodians; 41 N. Y. Super. 284; Phelps v. People, 72 N. Y. 334; Cross v. Brown, 41 N. H. 283. All of these are liable on the principle of bailees for mutual benefit; they hold under an obligation in accordance with our definition at the outset.

4. Hired services about a chattel. — The locatio operis faciendi of Lord Holt. This includes: (1) hired custody, as by safe-deposit companies, warehousemen, wharfingers, agistors, and by any person who becomes a custodian for recompense; (2) hired work upon a thing, embracing a wide range of secondary manual pursuits; (3) hired carriage of chattels by private carriers, who, unlike public or common carriers, do not make hired transportation their regular calling, and yet carry in the particular transaction for reward.

The question here is whether a reward was mutually intended in the case, and upon this the bailee's usual course of dealing, his line of business, is often important; 4 Thomp. & C. 96; 11 Blatchf. 362; 5 Ind. 131; Kirtland v. Montgomery, 1 Swan 452; Chamberlin v. Cobb, 32 Iowa 161; Francis v. Shrader, 67 Ill. 272; Carpenter v. Branch, 13 Vt. 161; 2 Cin. (Ohio) 246. Vocation, however, is of secondary consequence, for each bailment must stand upon its independent merits.

As to the responsibility of the present bailee, ordinary or average diligence is required. This is such care and diligence

as prudent persons of the same class are wont to exercise towards such property, or in the management of their own property under like circumstances. For failure to exercise this degree of care and diligence, the bailee must respond. This rule is very frequently applied to warehousemen; 51 Barb. 148; Vincent v. Rather, 31 Tex. 77; Morehead v. Brown, 6 Jones L. 367; Moulton v. Phillips, 10 R. I. 218; Jones v. Hatchett, 14 Ala. 743; Myers v. Walker, 31 Ill. 353; White v. Colorado Central R., 3 McCr. 559; Schwerin v. McKie, 51 N. Y. 180; Jones v. Morgan, 90 N. Y. 4; Chenowith v. Dickinson, 8 B. Mon. 156; 3 Blatchf. 413. To safe depositaries; Safe Deposit Co. v. Pollock, 85 Penn. St. 391; National Bank v. Graham, 100 U. S. 694, 704. To wharfingers; 2 Barb. 326; Rogers v. Stophel, 32 Penn. St. 111: Cox v. O'Riley, 4 Ind. 368; 9 Ben. 34. To agistors, or those who keep the animals of others; Maynard v. Buck, 100 Mass. 40; Halty v. Markel, 44 Ill. 225; Eastman v. Patterson, 38 Vt. 146; McCarthy v. Wolfe, 40 Mo. 520. To forwarders and private carriers for hire; White v. Bascom, 28 Vt. 268; Pennewill v. Cullen, 5 Hare 238. To workmen upon chattels generally; Baird v. Daley, 57 N. Y. 236; 25 Ill. 297; Russell v. Koehler, 66 Ill. 459; Hillyard v. Crabtree, 11 Tex. 264; Halyard v. Dechelman, 29 Mo. 459; 22 Mo. 150; Kelton v. Taylor, 11 Lea 264. To captors and prize agents; The Anne, 3 Wheat. 435; 1 Mass. 24, 96. To one who holds the property in a replevin suit under a bond; Bobo v. Patton, 6 Heisk. 172. To judicial officers generally, whose duty toward the thing is for recompense; Blake v. Kimball, 106 Mass. 115; Cross v. Brown, 41 N. H. 283; Aurentz v. Porter, 56 Penn. St. 115. To salvors, and to finders who are stimulated by the offer of reward; Wentworth v. Day, 3 Met. 352; Cummings v. Gann, 52 Penn. St. 484; 4 Cranch 347; Dows v. Nat. Exch. Bank, 1 Otto 618. Inevitable accident, loss from the operation of natural

Inevitable accident, loss from the operation of natural causes, from fire or other casualty, and from public enemies, excuses the bailee; Norway Plains Co. v. Boston & Maine R., 1 Gray 263; Cowles v. Pointer, 26 Miss. 253; Francis v. Dubuque R., 25 Iowa 60; Waller v. Parker, 5 Coldw. 476; Abraham v. Munn, 42 Ala. 51; 51 Ga. 336. But if the bailee's negligence contributed essentially to the loss he is not exonerated; Smith v. Meegan, 22 Mo. 150; 20 La. Ann. 297; Merchants' Trans. Co. v. Story, 50 Md. 4; White v. Colorado Cen-

tral R., 3 McCr. 559; Wilson v. Southern Pacific R., 62 Cal. 164 (where the careless use of kerosene caused the fire). The bailee should by ordinary efforts make the loss as light as possible in case of calamity; 7 Cow. 497; Chenowith v. Dickinson, 8 B. Mon. 156; Claflin v. Meyer, 75 N. Y. 260.

Ordinary skill is expected from every one assuming to be a bailee in a particular vocation, and he is liable for the failure to exercise it; 1 W. & S. 60; Kuehn v. Wilson, 13 Wisc. 104; Hillyard v. Crabtree, 11 Tex. 264; Francis v. Shrader, 67 Ill. 272; Smith v. Meegan, 22 Mo. 150. Even custodians must exercise what is called ordinary skill; Hamilton v. Elstner, 24 La. Ann. 455; Wallace v. Canaday, 4 Sneed 364.

Full force should be given, however, as in other bailments, to all special stipulations, express or implied, within the bounds of public policy; Thomas v. Cummiskey, (Penn.) 19 Rep. 633; Hatchett v. Gibson, 13 Ala. 587; Patten v. Bagge, 43 Ga. 167; Brandon v. Gulf City Man. Co., 51 Tex. 121. A warehouseman's receipt, for instance, may modify by terms brought to the customer's knowledge.

Good faith should be pursued; and the bailee is liable if he attempts to appropriate or sell the chattel, and also if he falsely pretends to have skill or opportunity which he does not possess; Davis v. Bigler, 62 Penn. St. 242; Calhoun v. Thompson, 56 Ala. 166; 61 Cal. 405; Stephenson v. Price, 30 Tex. 715. But as to assigning his mere interest as bailee, see Nash v. Mosher, 19 Wend. 431; Bailey v. Colby, 34 N. H. 29.

The bailee may be liable to third persons for injuries occasioned by the property bailed to him, as, for instance, by trespassing cattle of which he is the agistor. Weymouth v. Gile, 72 Me. 446.

Our hired bailee is entitled: (1) To undisturbed possession. (2) To suitable recompense, which may have been expressed or implied. Garrard v. Moody, 48 Ga. 96; Graves v. Smith, 14 Wisc. 5, 8; Schouler, Bailm. § 111, etc. Whether he is entitled to recompense though the chattel should accidentally perish while in his hands, cf. Wilson v. Knott, 3 Humph. 473; Brumby v. Smith, 3 Ala. 123. If the bailee simply leaves the work unfinished, he can claim no compensation, as a general rule; or none, at least, without deducting for the damage occasioned to the employer by his default; Faxon v. Mansfield, 2 Mass. 147. If the default be not from actual misconduct, and

the bailor has received a substantial benefit from the work, the bailee may, as a rule, recover his compensation, less any special damage sustained by the necessity of having the work finished elsewhere; Hillyard v. Crabtree, 11 Tex. 264: Jennings v. Camp, 13 Johns. 95. The same principles apply in case the work has been done differently from the mutual expectation; Merrill v. Ithaca R., 16 Wend. 586. The use of better materials than were called for, or the bestowal of better work, does not increase the compensation, unless the bailor has assented to such change in the original engagement; Dermott v. Jones, 2 Wall. 1. Want of diligence in a salvor, too, reduces the compensation allowed him; Brightly, Fed. Dig. Salvage, VII.; 4 Cranch 347; 2 Ben. 174. Incidental expenses about the thing bailed, such as food and shelter for a horse, must be borne by the bailee, unless otherwise agreed; Whitlock v. Heard, 13 Ala. 776. The bailee's recompense is presumed sufficiently high to indemnify him; Small v. Robinson, 69 Me. 425, citing Gilson v. Gwinn, 107 Mass, 126. See also 19 Pick, 228. But as to extraordinary expenses for preserving the thing in an unforeseen emergency, the bailor may be chargeable, though the bailee ought, if possible, to get his instructions.

The bailee may sue third persons who invade his rights, in any proper action of tort; 15 Mass. 242; 3 Vt. 302; Hare v. Fuller, 7 Ala. 717; Hopper v. Miller, 76 N. C. 402; Harvey v. Terre Haute R., 74 Mo. 528; Shaw v. Kaler, 106 Mass. 448. He may also sue others for breach of contract obligation with him, by virtue of his valuable interest. He has an insurable interest in the chattel; 1 Hall 84; Johnson v. Campbell, 120 Mass. 449; White v. Madison, 26 N. Y. 17; Insurance Co. v. Chase, 5 Wall. 513.

On the termination of the bailment, delivery back must be to the bailor or to his order; Reamer v. Davis, 85 Ind. 201; Kowing v. Manly, 49 N. Y. 192; Parker v. Lombard, 100 Mass. 405. If the bailee, although innocently, delivers to the wrong party, he is liable as for a conversion; 3 Cush. 399; Parker v. Lombard, 100 Mass. 405; 30 Tex. 715; 6 Bush 251; Dufour v. Mepham, 31 Mo. 577; 35 Ala. 209; McGinn v. Butler, 31 Iowa 160; Oswego Bank v. Doyle, 91 N. Y. 32. The bailee must hour his bailor's title; 23 La. Ann. 63; 67 N. C. 305; Peebles v. Farrar, 73 N. C. 342; Foltz v. Stevens, 54 Ill. 180; Estes v. Boothe, 20 Ark. 583. But, if adverse

claims of title are brought to his knowledge, he cannot disregard them; but he may interplead, or by other reasonable means protect himself from a perilous responsibility; Dodge v. Meyer, 61 Cal. 405; Rogers v. Weir, 34 N. Y. 63; Ball v. Liney, 48 N. Y. 6; Kelley v. Patchell, 5 W. Va. 585; Roberts v. Yarboro, 41 Tex. 449. See also Cook v. Holt, 48 N. Y. 275; Burton v. Wilkinson, 18 Vt. 186; Mortimore v. Ragsdale, 62 Miss. 86. See Ins. Co. v. Kiger, 103 U. S. 352, as to the negotiability of warehouse receipts. And cf. the old rule favored in Hallgarten v. Oldham, 135 Mass. 1, as against Durr v. Hervey, 44 Ark. 301, and 52 Cal. 611.

If delivery be refused by the bailee, the bailor may sue in trover or for a breach of the contract; Leonard v. Dunton, 51 Ill. 482; Bates v. Stansell, 19 Mich. 91. But he ought first to tender what is due to the bailee; Brown v. Dempsey, 95 Penn. St. 243.

As a security for his recompense, the hired bailee has a lien on the chattel; Harris v. Woodruff, 124 Mass. 205. Workmen, custodians, wharfingers, etc., all have such a lien; and the particular lien for recompense on a thing is greatly favored as a means of security. Agistors at common law form the only exception; they have no lien; but statutes have very generally supplied the defect. Local statutes considerably extend the common-law lien, both as to instances of the right itself and the means of enforcing it. For a full discussion of the bailee's lien, see Schouler, Bailm. 2d ed. §§ 122–127. And see Jones and other general writers on the law of lien.

Apart from his lien, the bailee for hired service has a right to sue for his recompense, on the ground that a debt is enforceable apart from the security; Garrard v. Moody, 48 Ga. 96; Tucker v. Taylor, 53 Ind. 93; Cole v. Tyng, 24 Ill. 99.

5. Hired use of a chattel.—This is locatio rei according to Lord Holt's classification, and the correlative of the gratuitous loan. Here the temporary beneficial use of the thing is for a recompense. In general, a claim for the use of a thing for a certain time is supported by proof of one's possession for that time, with the right to use it at pleasure; Reilly v. Rand, 123 Mass. 215. The transaction is familiar enough; as, for instance, the hire of a boat, a piano, a sewing-machine, or furniture; but few cases of consequence are found in the reports, save as to the hire of a horse and carriage.

The hirer, like all other mutual-benefit bailees, is bound to exercise ordinary care and diligence towards the thing; Collins v. Bennett, 46 N. Y. 490; Chamberlin v. Cobb, 32 Iowa 61; cases infra. The most familiar illustration is that of a horse hired for use. Want of ordinary care may consist in the hirer's improper feeding or omission to feed; Eastman v. Sanborn, 3 Allen 594; Cross v. Brown, 41 N. H. 283. Or in overdriving and overheating; Banfield v. Whipple, 10 Allen 27; 13 Gray 234; Wentworth v. McDuffie, 48 N. H. 302; Rowland v. Jones, 73 N. C. 52; Ray v. Tubbs, 50 Vt. 688; Buis v. Cook, 60 Mo. 391. Or in overloading. See 1 Yerg. 73; 3 Barb. 380. Or in securing the horse improperly. See Jackson v. Robinson, 18 B. Mon. 1. Or in continuing his journey carelessly, or giving quack remedies, after he finds that the animal is sick; Thompson v. Harlow, 31 Ga. 348. Inevitable accident, or superior force causing the loss or injury, of course, excuses the bailee; Watkins v. Roberts, 28 Ind. 167; 33 Barb. 241; Field v. Brackett, 56 Me. 121; McEvers v. Steamboat Sangamon, 22 Mo. 187. Or in the case of a hired animal, its sickness or death under like circumstances; 3 Barb. 380; Carrier v. Dorrance, 19 S. C. 30; Francis v. Shrader, 67 Ill. 272. But if the cause of such loss or injury is traceable to the negligence or abuse of the bailee, to his want of ordinary care, or misconduct, he is responsible: Buis v. Cook, 60 Mo. 391; Eastman v. Sanborn, 3 Allen 594; Edwards v. Carr, 13 Gray 234; Wentworth v. Mc-Duffie, 48 N. H. 402. This rule applies in cases of robbery, theft, and the escape of animals from the possession of the bailee; Beverly v. Brooke, 2 Wheat. 100. See Jones v. Morgan, 90 N. Y. 4.

The nature of the thing, its condition, and the like, must be considered in determining the "ordinary care" required; Millon v. Salisbury, 13 Johns. 211. The skill or reputation of the hirer, as brought to the knowledge of the letter, is properly considered; yet one who lets horses, etc., may usually trust to the pecuniary responsibility of his hirer; Mooers v. Larry, 15 Gray 451.

The bailee may, by special contract, enlarge his liability, even to the extent of securing the bailor against all loss whatsoever; see Collins v. Bennett, 46 N. Y. 490; 74 N. C. 274; Harvey v. Murray, 136 Mass. 377; 102 Ind. 146. On the other hand, he may lessen his liability by special contract. Field v. Brackett,

56 Me. 121. Special stipulations as to the manner and time of use, as well as the degree of responsibility, may be made—subject, as in all bailments, to the limitations imposed by public policy.

Deviation from the bailment is sometimes considered in this class of cases. One who keeps within the terms of his bailment honestly is liable only for want of ordinary care; but if he transcends the limits understood, he is guilty of a breach of faith, and becomes liable as a wrongdoer; 5 Mass. 104; Lucas v. Trumbull, 15 Gray 306. Thus, where the hirer of a horse wrongfully drives it beyond the place designated, or in a different direction, he becomes absolutely liable for any loss or injury to the animal; 17 N. Y. Super. 474; Fisher v. Kyle, 27 Mich. 454; Wentworth v. McDuffie, 48 N. H. 402; Lane v. Cameron, 38 Wisc. 603; Ray v. Tubbs, 50 Vt. 688; Stewart v. Davis, 31 Ark. 518. See also De Voin v. Michigan Lumber Co., 64 Wisc. 616. In Homer v. Thwing, 3 Pick. 392, the bailee, though an infant, was thus held liable. Such a contract must, however, be reasonably interpreted. A slight deviation without wrongful intent may leave the bailee on his usual footing; Spooner v. Manchester, 133 Mass. 270; Schouler, Bailm. §§ 140, 141. If the bailee deviates, it may be shown in his defence that the loss would have occurred had he not deviated: Harvey v. Epes, 12 Gratt. 153. We think, too, that a just and reasonable interpretation of the contract of hire will not always confine the bailee so very strictly; thus, if he hires a horse for an hour, he may have been permitted to use the horse two hours by paying for the extra time.

For the rule in cases of illegal use by the bailee, especially in violation of Sunday laws, see Horne v. Meakin, 115 Mass. 326; Logan v. Mathews, 6 Penn. St. 417; Schouler, Bailm. § 143.

Hired use of a thing is not generally personal, and it is still a question how far the bailee is responsible at our law for injury or loss occasioned by his sub-users. We apprehend that the usual rules of agency govern the case. See Schouler, Bailm. 2d ed. §§ 145–147, where this subject is discussed.

During the continuance of this bailment relation, the hirer has an exclusive right to the agreed beneficial use of the thing without hindrance or molestation by the letter or his creditors; Hartford v. Jackson, 11 N. H. 145.

The letter must exercise good faith, and is liable in damages if he lets a chattel (a vicious horse, for instance) knowing it to be unsuitable for the bailment purpose, or dangerous; Horne v. Meakin, 115 Mass. 326; Hadley v. Cross, 34 Vt. 586; Windle v. Jordan, 75 Me. 149.

As to the hirer's rights against third persons: By virtue of his special property and beneficial interest in the thing, the hirer may sue third persons in trover or replevin, or for breach of some contract privity with him; Woodman v. Nottingham, 49 N. H. 387; Rindge v. Colerain, 11 Gray 158; White v. Bascom, 28 Vt. 268; 48 Barb. 339; McGill v. Monette, 37 Ala. 49; Hopper v. Miller, 76 N. C. 402; Brewster v. Warner, 136 Mass. 57; 9 N. H. 246; 2 M'Mull. 434. If the bailment has ended, or if the bailor has an immediate right to end it, he may sue the injuring third party in his own right: Drake v. Redington, 9 N. H. 243; 18 N. H. 457; 2 M'Mull. 434; Felton v. Hales, 67 N. C. 107. A full recovery by either bailor or bailee is a bar to an action by the other, and if they are in accord as to which of them shall sue, the injuring party cannot complain; Brewster v. Warner, 136 Mass. 57; Dumas v. Hampton, 58 N. H. 134.

Concerning the termination of this bailment: If the time of redelivery be not otherwise fixed, the chattel must be returned upon demand; Cobb v. Wallace, 5 Cold. 539. If the bailment was for a fixed period which has expired, no demand is necessary; Morse v. Crawford, 17 Vt. 499; Ross v. Clark, 27 Mo. 549; Negus v. Simpson, 99 Mass. 388; Benje v. Creagh, 21 Ala. 151. Nor is a demand needful where the thing has been wrongfully converted or destroyed; Morse v. Crawford, 17 Vt. 499. See Trotter v. McCall, 26 Miss. 413. The letter in the latter case may at once sue in trover; Lucas v. Trumbull, 15 Gray 306; Wentworth v. McDuffie, 48 N. H. 402, and cases cited. But see Harvey v. Epes, 12 Gratt. 153. If the chattel be destroyed, the bailor may elect to sue in trespass: Setzar v. Butler, 5 Ired. 212. For mere misuse during an unexpired term of hire, an action on the case, founded in the hirer's tort, appears to be the proper remedy; Lane v. Cameron, 38 Wisc. 603; Setzar v. Butler, supra. An assignment of the bailee's interest merely, with a due reservation of the bailor's rights, does not amount to a conversion; Bailey v. Cobb, 34 N. H. 29; Vincent v. Cornell, 13 Pick. 294; Nash v. Mosher, 19 Wend. 431. The letter may waive his right of action, but merely receiving back the

chattel is not such waiver; Lucas v. Trumbull, supra; Austin v. Miller, 74 N. C. 274. See also Bigbee v. Coombs, 64 Mo. 529. The chattel should be redelivered in good condition, ordinary wear and tear excepted; but the bailee is not liable if the chattel is returned injured, or is not returned at all, provided he was not culpably negligent in such loss or injury; Carrier v. Dorrance, 19 S. C. 30. But see Buchanan v. Smith, 17 N. Y. Supr. 474. If no satisfactory excuse is given for failing to redeliver, the bailor may recover damages for the detention, in addition to the hire money; Vaughan v. Webster, 5 Harr. 256; Benje v. Creagh, 21 Ala. 151; Negus v. Simpson, 99 Mass. 388. Where the letter sells the chattel which was returned by the hirer carelessly injured, the latter may set off the proceeds of the sale against the former's claim for damages as for a total loss; Austin v. Miller, 74 N. C. 274. The hirer should not dispute his bailor's title, but may protect himself against superior claims of ownership which are brought to his notice. See Erwin v. Arthur, 61 Mo. 386.

Besides the duty to redeliver or deliver over at the end of this bailment, the hirer should make final recompense for the use of the thing, unless he has rendered it in advance.

Extraordinary expense for the preservation of the thing, if the hirer was not remiss, should be borne by the letter; Jones v. Morgan, 90 N. Y. 4. Aliter if the hirer be remiss; Bigbee v. Coombs, 64 Mo. 529. Incidental expenses, as, e. g., feeding and sheltering a horse on a long journey, are usually understood to be borne by the hirer. A hirer at fault may have to make good the damage occasioned by his remissness and pay the recompense besides; Bigbee v. Coombs, 64 Mo. 529. But our modern law of damages rests satisfied with making the injured party whole under his contract.

6. Pledge or pawn. — This is the bailment of a chattel for some debt or engagement. It corresponds to the Roman pignus, a term involving the idea of manual delivery, as distinguished from hypotheca, a naked agreement for security without transfer of possession; a term we apply in the case of a bottomry bond upon a vessel; The Grapeshot, 9 Wall. 129.

"Collateral security" is a modern term, which has not yet acquired a precise legal significance; but it seems to embrace, in the broadest sense, both pledge and chattel-mortgage transactions, while more appropriately applied to the former class, and in

the stricter phrase to pledges of incorporeal personalty alone. See Chambersburg v. Smith, 11 Penn. St. 120. It comes chiefly into use in our later business transactions, where stock and commercial paper are given in security.

A pledge and a chattel mortgage are to be distinguished theoretically. A giving in security with no immediate change of title is a pledge; but if a transfer of the legal title be intended, with a proviso by way of defeating it, the transaction is a mortgage; Atwater v. Mower, 10 Vt. 75; Brown v. Bement, 8 Johns. 96; Kimball v. Hildreth, 8 Allen 168; Leach v. Kimball, 34 N. H. 568, per Bell, J.; Thompson v. Dolliver, 132 Mass. 103. An actual or constructive change of possession on security better comports with the character of pledge than of chattel mortgage; Coty v. Barnes, 20 Vt. 78; Woodman v. Chesley, 39 Me. 45; Whiting v. Eichelberger, 16 Iowa 422; Rowley v. Rice, 10 Met. 7. These are the two decisive tests, so far as tests remain to distinguish the pledge and chattel mortgage. pledge is preferable in case of doubt, for it upholds the mutual rights of parties better by not making the title absolute in the obligee upon the mere non-performance of the obligor.

In such questions of transfer, where personal property is concerned, writings are not conclusive; but it may be shown that a transfer under a bill of sale absolute on its face was intended for security only; Caswell v. Keith, 12 Gray 351; Smith v. Beattie, 31 N. Y. 542; 3 Mich. 211; 9 Bosw. 322; Houser v. Kemp, 3 Penn. St. 208; Hudson v. Wilkinson, 45 Tex. 445; Wilson v. Little, 2 Comst. 443; 3 Col. 551; Rohrle v. Stidzer, 50 Cal. 207; 16 Ala. 211; Harris v. Lombard, 60 Miss. 29.

The essentials of the pledge contract are as follows:—(1) A subject-matter. Every kind of personalty may be pledged, not only merchandise and household goods, but incorporeal chattels, such as bills and notes, coupon bonds, public securities, claim vouchers, shares of stock, title deeds, deposit bonds, mortgages, leases, insurance policies, and other negotiable and quasi negotiable instruments. Schouler, Bailm. § 172, and cases cited. That which is incapable of delivery, if it be assignable, may at least be pledged, by delivery of the muniment or voucher. See Talty r. Freedman's Savings Co., 93 U. S. 321. And see as to pledging a limited partnership interest, 107 Penn. St. 590. Property which is pledged must exist, yet one may pledge, as he may sell, that which has not yet come into being.

by way of a reversion. See Gittings v. Nelson, 86 Ill. 591; Macomber v. Parker, 14 Pick. 497; Smithurst v. Edmunds, 14 N. J. Eq. 408. Equity moulds the law in this direction. But here the pledgee ought to obtain actual or constructive possession as soon as the thing is acquired by the pledgor or comes into existence, if he would secure himself against intervening third parties, such as the pledgor's creditors. See Goodenow v. Dunn, 21 Me. 86; Jones v. Richardson, 10 Met. 481. The pledge of a thing carries its natural increase as accessory security; as, for instance, the new-born in a flock of sheep, products like wool, milk, the coupons on a bond which bears interest, etc. The pensions, bounties, and pay of soldiers and sailors cannot be pledged; U. S. Rev. Sts. (1878) § 4745. National banks are restrained from loaning on the security of their own stock; Bank v. Lanier, 11 Wall. 369. But necessaries may be and are often pledged, and articles which are really exempt from attachment or execution sale; Frost v. Shaw, 3 Ohio St. 270. A cause of action growing out of a personal wrong cannot be pledged; Pindell v. Grooms, 18 B. Mon. 501. (2) A debt or engagement; which may be primary or secondary, on the pledgor's part, absolute or conditional, for the payment of money, or for any other lawful performance of an engagement; Brick v. Freehold Co., 37 N. J. L. 307; Stewart v. Davis, 18 Ind. 74; Wilcox v. Fairhaven Bank, 7 Allen 270. So, too, the security may be taken by the pledgee for the repayment of money loaned (which is the usual case), or so as to indemnify him for becoming an indorser or surety at the pledgor's instance; Blackwood v. Brown, 34 Mich. 4; Gilson v. Martin, 49 Vt. 474; Third Nat. Bank v. Boyd, 44 Md. 47; and see 9 Mart. 519. The pledge may be for all or part of a debt, for a general or a specific indebtedness; Fridley v. Bowen, 103 Ill. 633. But in the absence of special stipulations, the security is presamed to stand for the whole and every part of the debt or engagement. It may protect merely what is outstanding, or extend to future liabilities as they may arise, and cover for a fixed or an indefinite period, provided always that as to third parties it is no fraudulent device. Eichelberger v. Murdock, 10 Md. 373; Third Nat. Bank v. Boyd, 44 Md. 47; 1 Pick. 389; Holbrook v. Baker, 5 Me. 309; Texas Banking Co. v. Turnley, 61 Tex. 365; United States v. Hooe, 3 Cr. 73; Stearns r. Marsh, 4 Denio 227. (3) Mutual assent that the particular

subject-matter shall be handed over to secure payment or fulfilment of the particular debt or engagement. See Providence Thread Co. r. Aldrich, 12 R. I. 77. The parties should be capable; the pledge contract should not be illegal (though one in possession under an illegal contract has the advantage); the minds of both pledgor and pledgee should meet as in all contracts. Of the pledge by executors, guardians, and other fiduciary officers, and by agents in general, see Ashton v. Atlantic Bank, 3 Allen 217; 13 Rich. Eq. 269; Field v. Schieffelin, 7 Johns. Ch. 150; Petrie v. Clark, 11 S. & R. 377; Schouler, Bailm. §§ 181-183. It is not essential to the validity of the pledge contract that the thing pledged should belong to the pledgor himself. As between the parties themselves and against the general public, the transaction should stand, which some third party with a better title might successfully impugn. This is a general maxim in the law of bailments. So, too, as between two innocent parties, one of whom must lose, he shall suffer who enabled the wrong to be committed. Factors, brokers, and commission merchants could not pledge by the strict rule of the common law; First Nat. Bank v. Nelson, 38 Ga. 391; Warner v. Martin, 11 How. 209; Insurance Co. v. Kiger, 13 Otto 355. But the modern tendency of legislation in England and America is to allow such agents to pledge to the extent of their bona fide advances upon the goods. A pledgee's equity has, moreover, of late years, been protected, as in other cases of agency. See First Nat. Bank v. Boyce, 78 Ky. 42, for a full discussion of the subject.

For non-performance of the pledge contract, damages at law may be recovered, or, in certain cases, equity, perhaps, would decree a specific performance. See City Fire Ins. Co. v. Olmsted, 33 Conn. 476; First Nat. Bank v. Nelson, 38 Ga. 391; Beeman v. Lawton, 37 Me. 543. There is, of course, no pledge, no bailment, in the mere engagement to pledge. See Providence Thread Co. v. Aldrich, 12 R. I. 77. Generally speaking, the pledgee should have possession of the thing, in order to create a valid pledge; Corbett v. Underwood, 83 Ill. 324. Delivery is usual; but if the pledgee be already in possession, no formal change is necessary, even though the pledgee and pledgor are in joint possession; Brown v. Warren, 43 N. H. 430; Parsons v. Overmire, 22 Ill. 58. Methods of delivery and holding possession vary with the character of the personal property pledged.

A constructive delivery by transfer of a bill of lading makes the pledgee's title good, ordinarily, against the world; Dows v. Nat. Exchange Bank, 91 U.S. 618; Petitt v. First Nat. Bank, 4 Bush 334; First Nat. Bank v. Kelly, 57 N. Y. 34; Hathaway v. Haynes, 124 Mass. 311; 71 N. Y. 353. But some risks are run as to bona fide third parties for value, where, for instance, such instruments are made out in duplicate or triplicate; nor are bills of lading in a full sense negotiable paper. See 101 U.S. 557. For transfers of warehouse receipts and the like see Cartwright v. Wilmerding, 24 N. Y. 521; Taylor v. Turner, 87 Ill. 296; Gunsel v. McDonnell, 67 Iowa 526; 108 Penn. St. 258. The delivery of a savings-bank book may create a pledge of the deposit; Boynton v. Payrow, 67 Me. 587: Taft v. Bowker, 132 Mass. 277. Even the delivery of vouchers and muniments without a formal indorsement or assignment is upheld in these days, as between the parties, out of respect to their actual interest. As between the parties, any informal delivery may suffice; Keiser v. Topping, 72 Ill. 226; Tuttle v. Robinson, 78 Ill. 332; 7 La. Ann. 225; Dunn v. Meserve, 58 N. H. 429. Delivery may be made, of course, by an agent, and so may acceptance; and what complicates the case is that in modern times the pledgor is often treated as the pledgee's agent to take and keep possession, if he holds in good faith, without intent to defraud creditors; Rawson re, 2 Lowell 519; Parshall v. Eggert, 54 N. Y. 18; Cooper v. Ray, 47 Ill. 53. But this dangerous doctrine is restrained by the best considered of the latest cases, which maintain that a change of possession is essential as to third parties like bonâ fide transferees or attaching creditors of the pledgor; Casey v. Cavaroc, 96 U.S. 467; Thompson v. Dolliver, 132 Mass. 103. To sum up briefly, two leading conclusions may be drawn as to delivery in pledge: (1) In our modern business complexity, which introduces new kinds of chattels, the disposition increases to favor the natural intention of the transaction upon considerations of equity; (2) that the validity of delivery or possession in pledge differs in aspect (a) as between the pledge parties themselves, where informality is most favored, (b) as between the pledge parties and the pledgor's general creditors, (c) as between the pledge parties and those like a pledgor's attaching creditors, or purchasers, or new parties who advance and acquire intervening rights upon the thing without notice of the pledgee's title. Moreover, (d) the element of notice to the fundholder, custodian, or debtor, is in many such transactions of vital importance. Schouler, Bailm. § 199.

Pending full performance of the secured undertaking, the pledgee ought, in the first place, to keep possession. If he allows the pledgor to exercise full dominion and control over the thing pledged, the benefit of the security is lost by his abandonment of his rights; Whitaker v. Sumner, 20 Pick. 399; Day v. Swift, 48 Me. 368; 63 Me. 459; Black v. Bogert, 65 N. Y. 601; Citizen's Nat. Bank v. Hooper, 47 Md. 48; Casey v. Cavaroc, 96 U.S. 467. But where the pledgor gains repossession as the mere agent of the pledgee, or wrongfully, or for some temporary object agreed upon, the right of the pledgee is not lost, as against him; Cooper v. Ray, 47 Ill. 53; Macomber v. Parker, 14 Pick. 497; Hutton v. Arnett, 51 Ill. 198; Thayer v. Dwight, 104 Mass. 254; 114 Mass. 116; 2 Lowell 519; Way v. Davidson, 12 Gray 465; Bruley v. Ross, 57 Iowa 651; White v. Platt, 5 Denio 269; 18 Fed. R. 677; 2 McCord Ch. 126. For the fact of redelivery or repossession is here open to explanation, and such purpose is not inconsistent with the intent to enforce one's lien as pledgee. But here come into view again the distinctions just noted. Such a posture is dangerous as concerning bona fide third parties with intervening rights. For if the pledgee intentionally or carelessly parts with the possession, his pledge is of no avail, as against third persons who may have acquired rights in rem for value, honestly and without notice; Walker v. Staples, 5 Allen 34; 8 Allen 167; 37 Me. 543; Shaw v. Wilshire, 65 Me. 485. In securities strictly negotiable, and not overdue, a bona fide holder for value would be protected under the usual rules, even though the property were stolen from the pledgee. In property not strictly negotiable, shares of stock, etc., there is another principle less strong which may sometimes protect the bona fide third party: namely that, where one of two innocent parties must suffer, he should bear the loss whose conduct induced the difficulty. But a pledgee out of possession may, by seasonable notice to the third party, preserve his right of security; Palmtag v. Doutrick, 59 Cal. 154; Carrington v. Ward, 71 N. Y. 360; 83 N. Y. 287. And a dispossession of the pledge, under circumstances which impute to the pledgee no fault nor voluntary consent, does not, we presume, except

in the case of negotiable securities, prevent him from regaining possession and priority, even as against bonâ fide third parties with intervening rights.

Next as to a pledgee's bailment responsibility for the thing: The standard of all bailments for mutual benefit, that of ordinary care and diligence, here obtains; 1 La. Ann. 344; Third Nat. Bank v. Boyd, 44 Md. 47; Girard Fire Ins. Co. v. Marr, 46 Penn. St. 504; Scott v. Crews, 2 S. C. N. S. 522; Petty v. Overall, 42 Ala. 145; Wells v. Wells, 53 Vt. 1; 6 Cal. 643; 98 Penn. St. 80; 56 How. (N. Y.) Pr. 68; a case where burglars stole articles from a pawnbroker's shop. Where the pledge is of book debts or negotiable instruments which will mature before the secured obligation, ordinary diligence and the fair intendment of the case require the pledgee to use reasonable means to collect them; Whitten v. Wright, 34 Mich. 92; 10 Bosw. 208; 10 Ala. 535; Word v. Morgan, 5 Sneed 79; 10 B. Mon. 239; Douglass v. Mundine, 57 Tex. 344; 3 Lea 215; Sample Co. v. Detwiler, 30 Kans. 386; Overlock v. Hills, 8 Me. 383; 4 Ind. 425; May v. Sharp, 49 Ala. 140; 2 McLean 369; Goodall v. Richardson, 14 N. H. 567; Lamberton v. Windom, 12 Minn. 232. And see Whitteker v. Charleston Gas Co., 16 W. Va. 717. On interest-bearing securities held in pledge, coupons and interest should be collected with ordinary diligence; Whitin v. Paul, 13 R. I. 40. So with realizing upon the breed and natural product of pledged animals there should be ordinary care. But the pledgee is only obliged to exercise ordinary care in all such cases, and is liable for the actual loss resulting from his negligence accordingly; Roberts v. Thompson, 14 Ohio St. 1; Lee v. Baldwin, 10 Ga. 208; Drake v. White, 117 Mass. 10; Marschuetz v. White, 50 Wisc. 175; 2 McCr. 505; Reeves v. Plough, 41 Ind. 204. The pledgee of an insurance policy has been required to keep up the premiums, and save the policy from collapsing; 45 Bart. 111. In all such cases the fair intendment of the transaction, what the parties agreed should be done, must be the ultimate guide. See Goodall v. Richardson, 14 N. H. 567; Rice v. Benedict, 19 Mich. 132. Rather than make the security a new burden to himself, a pledgee would generally be justified in returning the collaterals seasonably to the pledgor, and leaving the latter to realize what he can.

The pledgee is bound, as a bailee, to good faith, and if he

attempts to act as owner of the pledged chattel he becomes liable as a tort-feasor; Parkes v. Hall, 2 Pick. 206; Lawrence v. Maxwell, 53 N. Y. 19. But as to the modern rule of subpledge we shall speak presently.

As to the pledgee's right to use the pledge, whatever of profit is derived from the thing goes properly to the pledgor's credit, while incidental expenses about it go to the credit of the pledgee; Geron v. Geron, 15 Ala. 562; 2 Murph. 111; Hunsaker v. Sturgis, 29 Cal. 142; Gilson v. Martin, 49 Vt. 474; Androscoggin R. v. Auburn Bank, 48 Me. 335; 8 Mo. App. 118; Merrifield v. Baker, 9 Allen 29. As to expenses, see Starrett v. Barber, 20 Me. 457; Hursh v. Coley, 22 Fed. Rep. 183; McCalla v. Clark, 55 Ga. 53, a case where assessments upon stock paid by the pledgee were held a proper charge for adjustment with the pledgor. The pledgee has no right, then, to use the thing, except by way of account. Antichresis of the Roman law, or the use of the profits of the security by way of keeping down the interest, is too oppressive a transaction to be favored in our law; Livingston v. Story, 11 Pet. 351. But the pledgee is entitled to hold all the natural increase, profits, and income of the property accruing during the continuance of the bailment, as accessory to the original security; Smith v. Atkins, 18 Vt. 461; 1 Hughes (U.S.) 17.

The pledgee has the right to an undisturbed possession of the thing pledged while the secured undertaking is pending, and may sue in damages the pledgor or any third person for the wrongful invasion of his right; or, instead, he may recover the chattel in replevin. This accords with the general law of bailments; Lyle v. Barker, 5 Binn. 457; Treadwell v. Davis, 34 Cal. 601; Noles v. Marable, 50 Ala. 366; Harker v. Dement, 9 Gill 7; Adams v. O'Connor, 100 Mass. 515; United States Express Co. v. Meinto, 72 Ill. 293; 17 Pick. 85; 13 Ill. 466:

He may also assign the pledge, subject to the original responsibilities of the original transaction — in other words, transfer his own interest therein; Whitaker v. Sumner, 20 Pick. 399; Shelton v. French, 33 Conn. 489; Belden v. Perkins, 78 Ill. 449; Ashton's Appeal, 73 Penn. St. 153; Whitney v. Peay, 24 Ark. 22; Van Blarcom v. Broadway Bank, 37 N. Y. 540; Proctor v. Whitcomb, 137 Mass. 303. See Heath v. Griswold, 18 Blatchf. 555. Here we suppose the act is subject to all the original restrictions; for to attempt to sub-pledge or

assign beyond his own demands, or to transfer as though he were the absolute owner, is a breach of trust and a fraud upon the original pledgor. But whether the original pledgor can recover the thing on better terms than before the transfer, and regardless of what he owed, is a different matter. Probably as to some kinds of chattels, such as private garments, a valuable work of art, etc., the pledge contract by its own fair intendment would not admit of passing on the custody to strangers at all without the pledgor's special permission; for, doubtless, it may be expressly agreed that a pledge shall not be assigned while there is no default by the pledgor. But as to marketable commodities at least, such as paper securities and corn, our modern rule favors a sub-pledgee or bonâ fide transferee for value from the original pledgee, even if the latter's transfer were in breach of faith. Here our latest American decisions follow the English rule of Johnson v. Stear, 15 C. B. N. S. 338; and Donald v. Suckling, L. R. 1 Q. B. 585. See English notes, supra. See also Talty v. Freedman's Savings Co., 93 U.S. 321, for a full discussion of the subject; Jarvis v. Rogers, 15 Mass. 389; Lewis v. Mott, 36 N. Y. 395; First Nat. Bank v. Boyce, 78 Ky. 42; Cherry v. Frost, 7 Lea 1; 74 N. Y. 223; Belden v. Perkins, 78 Ill. 449; Bradley v. Parks, 83 Ill. 169. See 6 Abb. N. Cas. 381, where the parcels belonged to different persons. And see Laloire v. Wiltz, 29 La. Ann. 329; Schouler, Bailm. 2d ed. §§ 218, 219. Hence, the original pledgor must first pay or tender the amount for which he pledged the thing before he can recover it from this sub-pledgee or third person, who is a transferee for value. Even the pledgee, when sued for his wrongful transfer, may, in general, recoup the secured debt in the damages; Belden v. Perkins, supra.

The bankruptcy or death of the pledgor does not affect the pledgee's rights; Yeatman v. Savings Institution, 95 U. S. 764; Jerome v. McCarter, 94 U. S. 734; Week's Case, 8 Ben. 265; Bennett v. Stoddard, 58 Iowa 654. Pledged chattels duly held in custody by the pledgee cannot be attached so as to supersede his claim; Pomeroy v. Smith, 17 Pick. 85; Stief v. Hart, 1 Comst. 20; Reichenbach v. McKean, 95 Penn. St. 432.

A pledgor may sell, assign, or mortgage his own interest in the thing subject to the pledgee's rights; Goss v. Emerson, 3 Fost. 38; Fisher v. Bradford, 7 Me. 28; Van Blarcom v. Broadway Bank, 37 N. Y. 540; Sanders v. Davis, 13 B. Mon. 432; Taylor v. Turner, 87 Ill. 296. The right of the pledgor to sue third persons for invading the pledgee's possession or injuring the pledge has not been fully determined. See Schouler, Bailm. 2d ed. § 223. The pledgee in practice is the preferable party to bring such a suit while his security is still depending; but, whichever party might sue the invader first, the court, if invoked, would duly protect the interest of the other in the thing. A pledgor is held to good faith and is liable in damages to his pledgee if the title fails and loss accrues in consequence; Mairs v. Taylor, 40 Penn. St. 446; White v. Platt, 5 Denio 269; Way v. Davidson, 12 Gray 465; Baker v. Arnot, 67 N. Y. 448. A pledgor of property which he does not own is estopped from setting up against his pledgee any title he may subsequently have acquired; Goldstein v. Hort, 30 Cal. 372.

If not contrary to statute or public policy, special stipulations between the pledged parties will regulate the transaction; 6 Cal. 643; Proctor v. Whitcomb, 137 Mass. 303; Lee v. Baldwin, 10 Ga. 218; Lawrence v. McCalmont, 2 How. 426; First Nat. Bank v. Root, (Ind.) 8 N. E. 105; Drake v. White, 117 Mass. 10.

In case of the pledgor's default as to the secured undertaking, pledgee has two remedies for enforcing the security. He may file a bill in chancery for a judicial sale under a decree of foreclosure; Hart v. Ten Eyek, 2 Johns. Ch. 62, 100; Boynton v. Payrow, 67 Me. 587; Chafee v. Sprague Man. Co., 14 R. I. 168; a tedious and expensive course, which may serve where the pledged property is of great value and conflicting interests are at stake, or points of doubtful title arise. Or, what is more commonly preferred, he may sell the thing at public auction, after giving reasonable notice to the pledgor, without judicial process at all. Due notice is essential. Bryan v. Baldwin, 52 N. Y. 233; Gay v. Moss, 34 Cal. 125; Cushman v. Hayes, 46 Ill. 145; Davis v. Funk, 39 Penn. St. 243; Stevens v. Hurlbut Bank, 31 Conn. 146. The notice should clearly state the time and place of the sale, and not set the time of sale unreasonably close to the date of notice. Washburn v. Pond, 2 Allen 474; Goldsmidt v. Church Trustees, 25 Minn. 202; Stearns v. Marsh, 4 Denio 227; 34 Md. 182. As to the sufficiency of a newspaper or other constructive notice, see Potter v. Thompson, 10 R. I. 1; Stokes v. Frazier, 72 Ill. 428.

Some authorities consider that the only safe course where the pledgee cannot be charged with actual notice is to file a bill in chancery; Stearns v. Marsh, 4 Denio 227. Where a demand is needful to put the pledgor in default, it should be made by the pledgee; Stevens v. Hurlbut Bank, 31 Conn. 146; Conyngham's Appeal, 57 Penn. St. 474; Wilson v. Little, 2 Comst. 443. But when the time for repaying a secured loan was plainly fixed in advance, a demand is not needful. Chouteau v. Allen, 70 Mo. 290. This non-judicial sale must be at public auction, not at private sale; 16 N.Y. 392; Strong v. Nat. Bank Assoc., 45 N. Y. 718; Washburn v. Pond, 2 Allen 474; White v. Rahway, 16 Fed. R. 833; 3 Col. 551. Even a sale at a broker's board has been held a private sale, and hence improper; 7 Hill 497; Wheeler v. Newbould, 16 N. Y. 392; Markham v. Jandon, 41 N. Y. 235. Sed qu. 41 Cal. 519; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242. See, further, Schouler, Bailm. §§ 233, 234.

If the sale be a fair one upon fair notice, the pledgee is not responsible for the low price obtained; Ainsworth v. Bowen, 9 Wisc. 348. See also King v. Texas Banking Co., 58 Tex. 669; 133 Mass. 482; Lewis v. Mott, 36 N. Y. 395; Newport Bridge Co. v. Douglass, 12 Bush 673. But if the pledgee purchases the pledged chattel himself, or is guilty of collusion with a sham purchaser, the sale is voidable at the option of the pledgor. Ogden v. Lathrop, 65 N. Y. 158; Middlesex Bank v. Minot, 4 Met. 25; 52 N. Y. 233; Chicago Artesian Well Co. v. Corey, 60 Ill. 73; Bank of Old Dominion v. Dubuque R., 8 Iowa 277; 14 Fed. R. 801; Hamilton v. State Bank, 22 Iowa 306. Not to speak here of special stipulations in advance, defects in such a sale on default may be waived by the pledgor. 22 Iowa 306; Clark v. Bouvain, 20 La. Ann. 70; 70 Mo. 290; Fisher, ex parte, 20 S. C. 179; Earle v. Grant, 14 R. I. 28. Lapse of time after knowledge of the facts may bar him from reopening such transfer.

Negotiable securities which will mature about the same time as the principal undertaking, or earlier, should, however, be collected, and not sold by the pledgee; Wheeler v. Newbould, 16 N. Y. 392; 17 Ind. 550; Reeves v. Plough, 41 Ind. 204; Lamberton v. Windom, 12 Minn. 232; Lazier v. Nevin, 3 W. Va. 622; City Savings Bank v. Hopson, (Conn.) 5 Atl. R. 601; Lobdell v. Merchants' Bank, 33 Mich. 408; Houser v.

Houser, 43 Ga. 415; 7 Wisc. 492; 21 La. Ann. 555. The pledgee who sues upon the collateral note in his own name does not thereby become a surety for the pledgor; Cardin v. Jones, 23 Ga. 175. Book-debts and claims overdue are naturally to be pressed; 16 W. Va. 717. A deposit of title deeds as security requires a bill in equity to enforce the lien; English v. McElroy, 62 Ga. 413. Mortgage bonds or other special kinds of security may require a special means of enforcement on default. As to enforcing the security of a savings-bank book, see Boynton v. Payrow, 67 Me. 587. Ordinary care and diligence is the standard still in realizing upon his security; but if the pledgee compromises the securities so as to sacrifice the pledgor's interest without the pledgor's sanction, he acts at his peril; Garlick v. James, 12 Johns. 146; 98 Ill. 613; Depuy v. Clark, 12 Ind. 427. See Thayer v. Putnam, 12 Met. 297; Union Trust Co. v. Rigdon, 93 Ill. 458.

In every case the security should be enforced according to its nature and the probable intent of the parties, and be reasonably applied to the discharge of the pledge obligation; 3 Mo. 219; Post v. Tradesmen's Bank, 28 Conn. 420. Increments of the pledge retained by the pledgee may be sold as well as the original pledge itself. If the pledge does not bring the full value of the claim, the deficit constitutes a personal charge against the pledgor; Faulkner v. Hill, 104 Mass. 188; Stokes v. Frazier, 72 Ill. 428. If, however, there remains a surplus, this belongs to the pledgor, or to subsequent lien-parties in his right; Hancock v. Franklin Ins. Co., 114 Mass. 155; Van Blarcom v. Broadway Bank, 37 N. Y. 540; Rohrle v. Stidger, 50 Cal. 207; Jesup v. City Bank, 14 Wisc. 331. Where the thing was pledged to the same party for two or more debts or engagements, and cannot satisfy all, the pledgee may appropriate the security as he sees fit; Wilcox v. Fairhaven Bank, 7 Allen 270; Strong v. Wooster, 6 Vt. 536. So where there are several securities for the same debt, he may select which he will enforce; Vest v. Green, 3 Mo. 219: Union Bank v. Laird, 2 Wheat. 390; Cullum v. Emanuel, 1 Ala. 23; Heid v. Vreeland, 30 N. J. Eq. 591. See Buchanan v. International Bank, 78 Ill. 500; Andrews v. Scottow, 2 Bland 629. But he must not oppress the pledgor in his exercise of this right, nor seek more than his one satisfaction; Fitzgerald v. Blocher, 32 Ark. 742. A security for a specific purpose must, as we have seen, be applied to that purpose alone, unless it is otherwise agreed between the parties. In general, if the amount recovered on the security be greater than the pledger owed, the pledgee recovers the excess for the pledger's use; Union Bank v. Roberts, 45 Wisc. 373.

The pledgee, however, we should observe, is not bound to sell on default of his pledgor, while, on the other hand, the pledge does not become his absolute property if he fails to do so; Badlam v. Tucker, 1 Pick. 400. And see 35 La. Ann. 520; O'Neill v. Whigham, 87 Penn. St. 394; Colquitt v. Stultz, 65 Ga. 305; Newsom v. Davis, 133 Mass. 343; Napier v. Central Georgia Bank, 68 Ga. 637. His omission to sell simply leaves the thing a mere pledge as before; and, of course, if the unsold pledge (such as stock, for instance) depreciates in value on his hands, he cannot be held liable while his pledgor is inert. What we chiefly observe is, that the pledgor should be alert for his own interest in this situation, and compel the sale he wishes, through the courts, if the pledgee will not make it; Smith v. Strout, 63 Me. 205; Granite Bank v. Richardson, 7 Met. 407; Williamson v. McClure, 37 Penn. St. 402; Richardson v. Ins. Co., 27 Gratt. 749; Robinson v. Hurley, 11 Iowa 410; Rozet v. McClellan, 48 Ill. 345; Wood v. Morgan, 5 Sneed 79; Bank of Rutland v. Woodruff, 34 Vt. 89.

This brings us to observe that the pledgee has a third remedy; viz., to sue the pledgor personally upon the debt, instead of pursuing the security, since the taking of security does not import a promise to pursue the security first; Elder v. Rouse, 15 Wend. 218; 2 Ind. 600; Bank of Rutland v. Woodruff, 34 Vt. 89; West v. Carolina Life Ins. Co., 31 Ark. 476. And see United States v. New Orleans, 98 U.S. 381. In such an event, he may attach the collaterals in his suit, nor is he precluded from holding the collaterals until full satisfaction is made of the secured undertaking; 19 Pick. 117; Buck v. Ingersoll, 11 Met. 226; Arendale v. Morgan, 5 Sneed 703; Smith v. Strout, 63 Me. 205; 98 Mass. 303; Charles v. Coker, 2 S. C. 122. When satisfaction is once obtained, the pledgee must restore the pledge or else account for its non-production; Stuart v. Bigler, 98 Penn. St. 80; Cutting v. Marlor, 78 N. Y. 454. And a pledgee may relinquish to his pledgor collateral security without impairing his right to proceed against him personally or upon other security; 2 W. & S. 463.

Special contract or a local statute may regulate the remedies

on default. See Schouler, Bailm. 2d ed. §§ 248, 249. And thus are private sales on default, or sales without the usual notice, or sales where the pledgee is purchaser, sustained often. For cases of special contract see Wilson v. Little, 2 Comst. 443; 45 Barb. 560; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242; Loomis v. Stave, 72 Ill. 623; Mowry v. Wood, 12 Wisc. 413; Chouteau v. Allen, 70 Mo. 290; Hamilton v. State Bank, 22 Iowa 306; 11 Iowa 410; 50 Cal. 207. But no special contract can violate public policy with impunity. Thus oppressive stipulations are held void; Lucketts v. Townsend, 3 Tex. 119; Dorrill v. Eaton, 35 Mich. 302; Goldsmidt v. Church Trustees, 25 Minn. 202. As, for instance, that on default the pledgee shall become absolute owner of the thing. Neither pledgee nor pledgor is to be sacrificed upon terms of doubtful import, but stipulations should be fairly construed.

Finally, as to the pledge on fulfilment of the secured undertaking. The pledgor, upon tender or payment of his debt at maturity, is entitled to a delivery back of the security; Blackwood v. Brown, 34 Mich. 4; Stuart v. Bigler, 98 Penn. St. 80; Cass v. Higenbotam, 100 N. Y. 248; 131 Mass. 14. More than this, if after default the pledge has been improperly sold or not sold at all, or the collaterals are still held without the pledgee's realizing upon and applying them to the secured undertaking, the pledgor's right of redemption continues. The pledgor may thus redeem the property within the statute of limitations, or even longer, upon full payment or satisfaction of the secured undertaking; Perry v. Craig, 3 Mo. 516; Jones v. Thurmond, 5 Tex. 318. The length of time in which one may thus redeem is not clearly fixed; but, in the absence of statute regulation, it appears to be largely a matter of judicial discretion. See Whelan v. Kinsley, 26 Ohio St. 131; Schouler, Bailm. 2d. ed. §§ 250, 251; White Mountains R. v. Bay State Iron Co., 50 N. H. 57. As to sufficiency of tender, the usual rules apply. If the pledgee here refuses to redeliver, the pledgor may sue for the thing pledged in trover, or perhaps in replevin; M'Lean v. Walker, 10 Johns. 471; Fisher v. Brown, 104 Mass. 259; Mitchell v. Roberts, 17 Fed. R. 776. And if he once gets repossession of the thing under such circumstances, he has good cause for maintaining it. The pledgee in a suit for repossession may show in defence that there is no full satisfaction, as that the pledge was to stand for future ad-

vances; Jarvis v. Rogers, 15 Mass. 389; Pettibone v. Griswold, 4 Conn. 158; Van Blarcom v. Broadway Bank, 37 N. Y. 540. And the pledgee's secured demand, whatever it may amount to, may generally be recouped in damages against even the pledgor's claim of damages for conversion. And see Gilliat v. Lynch, 2 Leigh 493; Schouler, Bailm. §§ 256, 257. The pledgor's action at law for repossession with damages for its detention is in general sufficient. But in a fit case equity will compel a specific redelivery. See Brown v. Runals, 14 Wisc. 693; Squier v. Squier, 30 N. J. Eq. 627; Doak v. Bank of State, 6 Ired. 309; Taylor v. Turner, 87 Ill. 296. The identical thing should, in general, when the bailment ends, be restored in good condition (subject to the exercise of ordinary care), together with all the net income, profits, or advantages derived from it: Thompson v. Toland, 48 Cal. 99; Merrifield v. Baker, 9 Allen 29; Gilson v. Martin, 49 Vt. 474; Lawrence v. Maxwell, 53 N. Y. 19.

This whole doctrine of pledge has developed unevenly at the common law. It involves often some intricate details; but general maxims of equity in aid of the principles we have set forth will readily solve them for the most part.

- 7. Exceptional bailments.—We come now to what may be called the exceptional bailments, which are these three: (1) Postmasters, (2) Innkeepers, (3) Common Carriers. All of these bailments arise upon recompense, and they are all known as public vocations. They are exceptional in point of legal responsibility, and the public character of the vocation is the cause of it. The responsibility of postmasters is exceptionally small, and that of innkeepers and common carriers is exceptionally great; while each class is to be considered by itself.
- 8. Postmasters.— Of such bailees the liability is exceptionally small because government is the true bailee, and it refuses, on grounds of public policy, to be sued by its citizens. Legislation, however, may afford partial redress, as in a court of claims. Carrying letters and packages from place to place is of course a bailment, and the postage stamp represents the recompense for such service. Jackson ex parte, 96 U.S. 727, upholds the power of Congress to regulate the transmission of mail matter. Letter-carrier routes are post-routes within the United States statutes which forbid private express companies to carry mail

matter where post-routes are established; Blackburn v. Gresham, 16 Fed. R. 609. See 23 Cal. 185.

The liability of postmasters, who are public servants, is to be determined by the rules of agency. They are not liable to those who use the mails for acts, however careless, when done in good faith, within the scope of their agency for government; Dunlop v. Munroe, 7 Cr. 242; Keenan v. Southworth, 110 Mass. 474; Central R. v. Lampley, 76 Ala. 357. The same rule applies to mail contractors and to assistants of a postmaster duly appointed and sworn into the service; Conwell v. Voorhees, 13 Ohio 523; Hutchins v. Brackett, 2 Fost. 252; 76 Ala. 357. But a postmaster may be liable as a private employer for the acts of a mere private assistant or clerk, not sworn into the service of government; 2 Fairf. 495; 4 Ohio St. 576; Schroyer v. Lynch, 8 Watts 453; 6 Barb. 632; Sawyer v. Corse, 17 Gratt. 230, where a mail contractor's agent was not duly qualified. So far as one is a public servant, he is answerable to his superior, to the government, and not to private citizens who may suffer through his carelessness in the bailment. For the remedy against a postmaster who refuses to deliver mail matter, see Boardman v. Thompson, 12 Fed. R., 675.

But, as with agents and servants generally, for losses occasioned by wilful misconduct, or by negligence beyond the scope of their public service and employment, he who commits the act is liable; for, quoad hoc, the bailee does not injure as the servant of the government; Ford v. Parker, 4 Ohio St. 582; Fitzgerald v. Burrill, 106 Mass. 446; 7 Cr. 242; 8 Watts 453; 110 Mass. 474. Such instances occur where a country grocer, who has a postoffice at his store, loses a letter through some carelessness connected with his storekeeping, or through his private clerk, or where one is given a letter for registry and sends it unregistered, or where he purloins.

Placing a letter in a street letter-box or a carrier's bag is a virtual deposit in the mail. See Wynen v. Schappert, 6 Daly 558.

The bailment principle applies to some extent to the telegraph and telephone business, though there is here no carrying of an identical thing to be delivered over. See Birney v. New York, etc., Teleg. Co., 18 Md. 341. Telegraphing and telephoning are in the United States transacted by private

companies; and it is fairly settled by this time that there is no exceptional responsibility attached to such an undertaking under the common law. See Schouler, Bailm. § 272, note. Such an undertaking is not strictly a bailment, but, like the delivery of oral messages, a business which falls under the comprehensive law of contracts.

9. Innkeepers. — An innkeeper is one who regularly keeps open a public house for lodging and entertaining transient comers, on the general expectation of his suitable recompense; Schouler, Bailm. § 279. This vocation falls well under the head of bailments in respect of caring for animals, baggage, and other personal property which the guest brings with him; and it is treated as a public pursuit at the civil as well as the common law. To define an inn is difficult. Many circumstances combined, such as the publicity and the regularity and permanency of the entertainment, must be considered; Walling v. Potter, 35 Conn. 183; 54 Barb. 311; Pinkerton v. Woodward, 33 Cal. 537; 5 Sandf. 242, 247; Dickerson v. Rogers, 4 Humph. 179; 49 Vt. 55. "Inn," "tavern," "hotel," are the words here employed. Hotels kept on the so-called "European plan" may be inns; Krohn v. Sweeney, 2 Daly 200; 33 N. Y. Super. 271; 33 Cal. 557. Whether every inn must have a restaurant, quære; but a mere restaurant for food and drink is no inn; Walling v. Potter, 35 Conn. 183. Nor is a sleepingcar; 73 Ill. 360; 118 Mass. 275. Apartment houses and boarding-houses are not properly inns. See Cromwell v. Stephens, 2 Daly 15; 33 Cal. 557. A jury under judicial instruction may decide upon all the circumstances whether one is an innkeeper or not; Clary v. Willey, 45 Vt. 55.

This exceptional bailment relation arises only as to guests. As to the property of all others, an innkeeper is no more than an ordinary bailee, with or without recompense. The question of guest must also be decided according to the circumstances of each case. Commonly, a guest is the temporary sojourner who retains that character during his stay at the inn; Hall v. Pike, 100 Mass. 495; Read v. Amidon, 41 Vt. 15; Shoecraft v. Bailey, 25 Iowa 553; Norcross v. Norcross, 53 Me. 163; 2 E. D. Smith 148; McDaniels v. Robinson, 26 Vt. 316, 334; Lusk v. Belote, 22 Minn. 468; see Curtis v. Murphy, 63 Wisc. 4. A boarder at an inn, on the other hand, is one who remains upon some special contract for a fixed

time. Chamberlain v. Masterson, 26 Ala. 371; Hancock v. Rand, 94 N. Y. 1. But an agreement for abatement of price by the week does not decisively convert one from a guest to a boarder; Berkshire Woollen Co. v. Proctor, 7 Cush. 217; Beale v. Posey, 72 Ala. 323; 25 Iowa 553; Jalie v. Cardinal, 35 Wisc. 118; 22 Minn. 468. And see Hancock v. Rand, 94 N. Y. 1. Customers at the shaving-saloon, bar, or restaurant of the inn, and casual visitors, are not legally guests; 24 N. Y. Super. 126; Carter v. Hobbs, 12 Mich. 52; Coykendall v. Eaton, 55 Barb. 188. The callers and invited visitors of guests are not necessarily guests of the house; 10 Daly 265. A townsman of the innkeeper may be a guest; 35 Conn. 183; for one need not be a traveller from a distance.

As to the property for which an innkeeper is liable, all the personal property of the guest which he has brought into the inn precincts is included at our law, and not baggage alone; Berkshire Woollen Co. v. Proctor, 7 Cush. 417. But see 11 Md. 434; 27 Md. 130; 14 La. Ann. 324. We shall see that this rigor of the law, whose policy applied to the remote days when travellers journeyed upon roads infested by highwaymen, is much lessened by modern statute.

An innkeeper's responsibility is exceptionally great, but the extent is not clearly established by actual decisions. See Fuller v. Coats, 18 Ohio St. 343, 350. We should distinguish it from that of a common carrier. One class of cases holds that positive proof that the innkeeper was not negligent will exonerate him. Another class pronounces him to be an insurer. All this is by way of dictum, however; Schouler, Bailm. § 288. The more cautious statement is that of Weisenger v. Taylor, 1 Bush 275. But, to go by precedents, an innkeeper is responsible for losses by the acts of himself, all his servants, guests, and whomsoever he has admitted to the inn precincts; 26 Ala. 371; 1 Bush 275; Rockwell v. Proctor, 39 Ga. 105; 33 Cal. 557; 6 Har. & J. 47; 26 Vt. 337; 1 Wilson (Ind.) 429. As for thefts, see 6 Har. & J. 47; Classen v. Leopold, 2 Sweeny 705; Epps v. Hinds, 27 Miss. 657; 26 Ala. 371; 22 Minn. 468; Bodwell v. Bragg, 29 Iowa 232; 37 Ga. 242. For a stealthy burglary, the innkeeper is primâ facie responsible; but if the breaking in from without be with force and violence, quære whether the innkeeper is liable when he can show that neither he nor any one within the inn precincts

contributed to the loss. See 18 La. Ann. 156; Clute v. Wiggins, 14 Johns. 175; 26 Vt. 317, 338; 1 Cal. 221; 33 Cal. 557. As for an innkeeper's liability for losses by some riot, mob, etc., regardless of his fault, we find no case which expressly rules upon that point. His exceptional liability relates chiefly to those who are in or about the inn precincts, for whose acts he is answerable far beyond the usual scope of principal and agency. As to losses by accidental fire, there is a reluctance to holding the innkeeper liable as a virtual insurer; Merritt v. Claghorn, 23 Vt. 177; 30 Mich. 259; Vance v. Throckmorton, 5 Bush 42; Burnham v. Young, 72 Me. 273. In New York the innkeeper was once held as an insurer in such a case, and the legislature promptly changed the law. See 33 N. Y. 577; 61 N. Y. 34. Losses by act of God or a public enemy will always exonerate an innkeeper; Shaw v. Berry, 31 Me. 478; Sibley v. Aldrich, 33 N. H. 553; Hill v. Owen, 5 Blackf. 323; 53 Barb. 451; 49 Vt. 477; 14 Ill. 129; 8 Blackf. 535. If there be any actual negligence or fault of the innkeeper or his servants, he is answerable for any loss sustained thereby; Clary v. Willey, 49 Vt. 55; 4 Humph. 179; 33 N. H. 553; 55 Barb. 188; 2 Daly 102; 25 Iowa 553; 14 Johns. 175; 33 Cal. 557; 36 Barb. 70; 1 Wilson (Ind.) 429; Olson v. Crossman, 31 Minn. 222.

Stabling is a special charge, and hence one may be liable as innkeeper for animals placed in his care by one not strictly a guest and receiving entertainment; Mason v. Thompson, 9 Pick. 280; 28 Vt. 387. See 33 N. Y. 577; 61 N. Y. 34; 64 N. Y. 377; Hilton v. Adams, 71 Me. 19. But see Healey v. Grav, 68 Me. 487. The inn precincts may properly include the stable. But there are limitations to the inn precincts; Minor v. Staples, 71 Me. 316. As a general rule, the bailment begins when the property reaches the reasonable possession and control of the innkeeper or his proper servants: but more particularly when one presents himself to register as a guest; Norcross v. Norcross, 53 Me. 163. It is enough that the guest, on his arrival, puts his things in the place customarily used by incomers, or lets the host's clerk, porter, or other suitable agent take them in charge; Rockwell v. Proctor, 39 Ga. 105; Piper v. Manny, 21 Wend. 283; Newson v. Axon, 1 McCord 509. Cf. Albin v. Presby, 8 N. H. 408. An occasional absence of the guest animo revertendi does not relieve the innkeeper from liability for property remaining in his care, where no intended

change of the relation appears; 5 Barb. 560. So the innkeeper's liability might possibly last after the guest has paid his bill; Seymour v. Cook, 53 Barb. 451. And see Bendetson v. French, 46 N. Y. 266. If the keeper sends his guest to or from the station he is at least liable for baggage as a carrier of passengers, if not as an innkeeper; 4 Cush. 114; 37 Ga. 242. But after the velation once ceases the innkeeper is properly an ordinary bailee, gratuitous or otherwise, and no more, for whatever goods the departing guest may have left in his care.

The guest or bailor sues for his loss either in contract or tort, at his option. And he makes out a primâ facie case by showing that he brought as a guest property infra hospitium, which on proper demand was not restored to him; Wiser v. Chesley, 53 Mo. 547; 27 Miss. 657; 1 McCord 509.

The innkeeper may exonerate himself by showing loss by act of the guest or a loss excusable on his own part. Thus, he may show that the guest did not confide the custody to him; Albin v. Presby, 8 N. H. 408; Houser v. Tully, 62 Penn. St. 92; Purvis v. Coleman, 21 N. Y. 111; 18 Ohio St. 343. A guest's baggage, however, is properly kept in his own room. The guest may have brought goods in some other capacity; as, to exhibit or sell at the inn; Mowers v. Fethers, 61 N. Y. 34. There may be shown, especially where the guest keeps the things in his own room, a want of ordinary care or misconduct on his part which contributes to or induces the loss. Contributory negligence on the guest's part will, if clearly proved, exonerate the innkeeper; 2 Sweeny 705; 26 Ala. 371; 18 Ohio St. 343; Hadley v. Upshaw, 27 Tex. 547; 14 La. Ann. 524; 35 Wisc. 118; 42 Ill. 469; Burrows v. Trieber, 21 Md. 320. Such acts, on the guest's part, as keeping his door unlocked are considered in modern cases evidence to be weighed by the jury. See Elcox v. Hill, 98 U.S. 218; 69 Ga. 206; 31 Minn. 222; Purvis v. Coleman, 21 N. Y. 111. As to what acts are evidence of contributory negligence, see 1 Hilt. 84; 26 Ala. 371; 68 Me. 489; Walsh v. Porterfield, 87 Penn. St. 376; Rubenstein v. Cruikshanks, 54 Mich. 199; Bohler v. Owens, 60 Ga. 185; Olson v. Crossman, 31 Minn. 222; Lanier v. Youngblood, 73 Ala. 587.

As to special qualifications of an innkeeper's responsibility by contract, custom, and legislation: It seems that an innkeeper may make a qualified acceptance of the property of a particular

guest; though not so as to divest himself of responsibility for the exercise of ordinary care and good faith. See Yorks Co. v. Central Railway, 3 Wall. 107. He may make reasonable rules as to the place where the guest is to put his property; Purvis v. Coleman, 21 N. Y. 111; Fuller v. Coats, 18 Ohio St. 343; 41 Vt. 15; 33 Cal. 557. But there must be some express or implied assent on the part of the guest to these special terms and rules. A mere posting of the notice in the rooms is not sufficient to qualify the innkeeper's common-law liability. Cases supra, also 29 Iowa 232; 33 N. Y. Super. 271. A local custom, if it be reasonable, and fairly understood by both parties, may control the innkeeper's liability; Albin v. Presby, 8 N. H. 408; 65 Barb. 274; Berkshire Woollen Co. v. Proctor, 7 Cush. 417. But at this day statute qualifications of the innkeeper's strict liability prevail almost universally, both in England and America, showing that public opinion in our modern age inclines to soften the ancient rigor of the law towards this vocation.

The main object of these statutes is to enable the innkeeper to gather valuable property where he can put his own special guards upon it. His liability is thus limited to losses where he or his servants were actually at fault, in the care of valuables, such as money, jewels, and ornaments which are not given into his special custody to be placed in the safe he has provided; though (as these acts run) he must post notices showing his intention and readiness to take such special custody conformably to statute. For property thus expressly deposited with him, his extraordinary liability continues; Wilkins v. Earle, 44 N. Y. 172. One's watch and chain, or money needful on the person, is not to be expressly delivered unless the language of the statute is carelessly framed; Noble v. Milliken, 74 Me. 225; Ib. 77 Me. 359; Ramaley v. Leland, 43 N. Y. 539; Maltby v. Chapman, 25 Md. 310; 1 Wilson (Ind.) 119. Cf. Stewart v. Parsons, 24 Wisc. 241; Hyatt v. Taylor, 42 N. Y. 259. If posting a notice is sufficient, by the terms of the statute, to reduce the innkeeper's liability, he is not responsible for loss of property not confided to him, even though the guest was not negligent, provided a reasonable opportunity were given to make the deposit with him; Rosenplaenter v. Roessle, 54 N. Y. 262. Unless he or his servants were actually at fault; 98 U.S. 218; 7 La. Ann. 360; 18 La. Ann. 156. See 46 N. Y. 266, 291, as to liability after the guest has given up the key of his room.

The sufficiency of an oral or constructive notice depends upon the language of the local statute. See 21 N. Y. 111; 31 Minn. 224; 73 Ala. 587; 69 Ga. 206; Beale v. Posey, 72 Ala. 323.

An innkeeper, when holding property outside the strict exercise of his public vocation, is an ordinary bailee; Carter v. Hobbs, 12 Mich. 52; 1 Utah 142; Adams v. Clem, 41 Ga. 65; 2 Daly 102; 60 Miss. 819; 2 Lea 312. As where the relation has ceased or not yet commenced, or he receives one with his baggage for free entertainment. A vocation resembling that of innkeeper, such as keeping boarders, but not a public one, leaves the liability on the usual bailment footing. The rule as to liability for a boarder's effects is not yet definitely laid down, but the grade appears to be that of an ordinary bailee for hire. The difficulty is to determine how far the boarding-house keeper is liable for acts of his servants. See Smith v. Read, 52 How. Pr. (N. Y.) 14; 6 Daly 33; 1 Utah 142; Schouler, Bailm. §§ 315, 316; 53 Mo. 547; 3 Kans. 257.

We may add generally that it is the duty of an innkeeper to receive as guests all persons who present themselves in a suitable condition, provided there be sufficient room for them in his inn; Watson v. Cross, 2 Duv. 147; Atwater v. Sawyer, 76 Me. 539; 1 Hughes 541. But here, for his remuneration, he has not only a lien on his guest's property, but may require payment in advance. As a general rule, the innkeeper has no right to select his guests; Markham v. Brown, 8 N. H. 523. But he need not entertain the agent of a rival inn who means to draw away his custom; Jencks v. Coleman, 2 Sumn. 221, 226. He may and should reject or expel disorderly and offensive guests, and shut out an infectious disease; 2 Pars. (Penn.) 431; Gilbert v. Hoffman, 66 Iowa 205. He must not extort, but make reasonable charges, and supply wholesome fare; Duchman v. Hagerty, 6 Watts 65. He may make salutary rules, but not such as would subject the guest to petty and humiliating discipline. As security for unpaid charges, the innkeeeper has a lien upon all the guest's property which is legally in his custody, on the faith of the public relation, even though the guest brought it as a bailee or agent for another; Alvord v. Davenport, 43 Vt. 30; Manning v. Hollenbeck, 27 Wisc. 202; Mowers v. Fethers, 61 N. Y. 34; 1 Rich. (S. C.) 213. As to animals, see Saint v. Smith, 1 Coldw. 51; Grinnell v. Cook, 3 Hill 485; 16 Ala. 666; 9 Pick. 280. Aliter as to lien where

the bailee had no right to deposit the chattels, and the innkeeper knew it, though a proper specific charge might be incurred for the benefit of the thing; Domestic Sewing Machine Co. v. Watters, 50 Ga. 573. There is, of course, no lien upon the garments which a guest wears upon his own person. The lien is not lost unless the innkeeper wittingly and willingly or carelessly lets the property go out of his hands; Perkins v. Boardman, 14 Gray 481, 483; 27 Wise. 202. See 43 Vt. 30, as to his duty towards a horse left on his hands. Modern legislation has a tendency to allow the innkeeper to realize upon his security by a sale at auction. See 11 Barb. 41; Case v. Fogg, 46 Mo. 44; Doane v. Russell, 3 Gray 382. He may, of course, disregard the lien and sue for his recompense; 2 Sweeny 705. There is no lien at common law upon the goods of boarders; Pollock v. Landis, 36 Iowa 651; Hursh v. Byers, 29 Mo. 469; Ewart v. Stark, 8 Rich. (S. C.) 423. But modern legislation confers this lien in many States.

10. Common carriers. — These furnish by far the most important class of bailees at the present day. The carriage of a thing from one place to another is illustrated by our present leading case; but there the carriage was without reward and not in the line of this highly responsible vocation. Common carriage is a public vocation like innkeeping; the rights and duties of these pursuits correspond quite closely; yet common carriage, whether on sea or shore, is nothing more than a bailment, a bailment attended, however, with peculiar risks and obligations, not to add peculiar privileges. A public or common carrier is one whose regular calling it is to carry chattels for all who may choose to employ and remunerate him; Dwight v. Brewster, 1 Pick. 50; Sheldon v. Robinson, 7 N. H. 157. There is no such class of pursuits as private carriers; but under this term we comprehend isolated cases of transportation (usually without reward) performed by those whose usual vocation is different. Wherever a thing is carried without reward, or by one not engaged in the business of carrying, the usual rules of bailment liability apply. The standard is essentially the same for carriers by land or by water; King v. Shepherd, 3 Story 349; Elliott v. Rossell, 10 Johns. 1.

In this common carrier's relation: (1) the transportation must be for reward, though not necessarily for money; Fay v. Steamer New World, 1 Cal. 348; 3 Barb. 388; Flint R. v.

Weir, 37 Mich. 111; Knox v. Rives, 14 Ala. 249; 1 Swan 452; 36 N. H. 26. See Pierce v. Milwaukee R., 23 Wisc. 387, as to the free return of empty bags, 2 Wend. 327; Michigan Central R. v. Carrow, 73 Ill. 348. The general presumption is that the common carrier has undertaken his particular transportation for hire; Gray v. Missouri R. Packet Co., 64 Mo. 47; 111 Mass. 45. (2) The transportation must be in pursuance of some public vocation which the carrier exercises. The criterion is whether he carries for particular persons only or whether he carries for every one, whether he pursues the carriage as a business or only casually pro hac vice; Mershon v. Hobensack, 22 N. J. L. 372; Verner v. Sweitzer, 32 Penn. St. 208; Cincinnati Mail Line Co. v. Boal, 15 Ind. 345; Elkins v. Boston & Maine R., 3 Fost. 275; Haynie v. Waring, 29 Ala. 263; 2 Story 32; Satterlee v. Groat, 1 Wend. 272; Fish v. Chapman, 2 Ga. 349; 1 Hayw. 14; Samms v. Stewart, 20 Ohio 71; Hollister v. Nowlen, 19 Wend. 234; Varble v. Bigley, 14 Bush 698. Whether in a given case a person is a common carrier, is a question of fact; Haslam v. Adams Express Co., 6 Bosw. 235; Allen v. Sackrider, 37 N. Y. 141; Flautt v. Lashley, 36 La. Ann. 106; Schouler, Bailm. § 345, etc. Thus, he may be such although he makes but one trip or this is his first; Steele v. Mc-Tyer, 31 Ala. 667; Fuller v. Bradley, 25 Penn. St. 120. But see 3 Fost. 275. And even though he pursues the carriage calling at the same time with other business; Gordon v. Hutchinson, 1 W. & S. 285; 39 Miss. 396; 1 Pick. 50. See Central R. v. Lampley, 76 Ala. 357; Chevallier v. Strahan, 2 Tex. 115; Moss v. Bettis, 4 Heisk. 661. But see 2 Ga. 349. Where one of another vocation is a public carrier for a certain season of the year, it does not follow that he is such at other seasons; Haynie v. Baylor, 18 Tex. 498.

The carriage need not be from one town in the State to another; 2 Dana 430; Burtis v. Buffalo R., 24 N. Y. 269. Nor between fixed termini; Pennewill v. Cullen, 5 Harr. 238; Tuckerman v. Stephens, etc., Trans. Co., 32 N. J. L. 320; Wilcox v. Parmelee, 3 Sandf. 610. Cf. Pitlock v. Wells, 109 Mass. 452. For one might take trips in his vehicle, leaving the course of transportation in each case to depend upon his customers' wishes; yet it is usual for a common carrier to hold himself out in any case as having some circumscribed limits. To charge a person as a common carrier, either a professed vo-

cation or a special undertaking must be proved; Tunnel v. Pettijohn, 2 Harr. 48; 30 Miss. 231; 2 Ga. 349; 39 Miss. 396; 14 Bush 698; 2 Story 16. The proof may be oral as well as written and evinced by one's conduct and eircumstances.

Now, to consider what pursuits are classed with common carriers: (1) Occupations by land: wagoners, teamsters, draymen, porters, expresses, stages, railways, are the most common. City and local jobbing expresses are of course common carriers; Verner v. Sweitzer, 32 Penn. St. 208; 2 Bosw. 589; 74 Ill. 116. Our modern express company for long routes, employing railways and steamboats, is liable as a common carrier, and not, like a forwarder, for ordinary diligence merely; Bank of Kentucky v. Adams Express Co., 93 U. S. 174; 6 Bosw. 235; 51 Barb. 69; Southern Express Co. v. Newby, 36 Ga. 635; Sweet v. Barney, 23 N. Y. 335; Southern Express Co. v. McVeigh, 20 Gratt. 264; Southern Express Co. v. Hess, 53 Ala. 19; United States Express Co. v. Backman, 28 Ohio St. 144; Christenson v. Am. Exp. Co., 15 Minn. 270; Buckland v. Adams Express Co., 97 Mass. 124. As to the liability of mere forwarding merchants, see Johnson v. New York Central R., 33 N. Y. 610; Proctor v. Eastern R., 105 Mass. 512. Stage-coaches and omnibuses are ordinarily carriers of passengers, and only common carriers in respect to the baggage which accompanies their passengers. If they are held out to be carriers for all who may choose to send on hire money or other chattels, the public vocation exists; Dwight v. Brewster, 1 Pick. 50; Beckman v. Shouse, 5 Rawle 179; 2 Dana 430; Powell v. Mills, 30 Miss. 231; Merwin v. Butler, 17 Conn. 138. As to omnibuses, see Parmelee v. McNulty, 19 Ill. 556; 32 Penn. St. 208; Dibble v. Brown, 12 Ga. 217; Parmelee v. Lowitz, 74 Ill. 116. But railways with their immense inland facilities are both passenger carriers and common carriers of freight and baggage; Camden & Amboy R. v. Burke, 13 Wend. 611; Thomas v. Boston & Providence R., 10 Met. 472; Hannibal R. v. Swift, 12 Wall. 262. Freight trains and passenger trains are usually run separately. A street railway is not ordinarily, but may become a common carrier; Levi v. Lynn, etc., Horse R., 11 Allen 300. In its usual course it carries passengers only, without even baggage. Sleeping-car companies are neither common carriers nor innkeepers in a full sense; Pullman Palace Car Co. v. Smith, 73 Ill. 360; 1 Flip. C. C. 500; 67 How. (N. Y.) Pr. 154. Cf. 1

Sheldon (N. Y. Super.) 457. Their liability is, at least, that of an ordinary bailee for hire; Kinsley v. Lake Shore R., 125 Mass. 4; Woodruff Co. v. Diehl, 84 Ind. 474. In some aspects the vocation seems a public one, e. g. patrons cannot be selected at the company's pleasure; Nevin v. Pullman Palace Car Co., 106 Ill. 222.

(2) Occupations by water: bargemen, ferrymen, canal companies, steamboat companies, flatboat-men, may be mentioned; Allen v. Sewall, 2 Wend. 327, 4 Heisk. 661; 31 Ala. 667. As to ferry companies, see White v. Winnisimmet Co., 7 Cush. 156; Smith v. Seward, 3 Penn. St. 342; 5 Mo. 36; Sanders v. Young, 1 Head 219; Wilsons v. Hamilton, 4 Ohio St. 722; Powell v. Mills, 37 Miss. 691; Hall v. Renfro, 3 Met. (Ky.) 51; 107 Mass. 334; Harvey v. Rose, 26 Ark. 3; Self v. Dunn, 42 Ga. 528; Ferris v. Union Ferry Co., 36 N. Y. 312; Wyckoff v. Queen's County Ferry Co., 52 N. Y. 32. As to canal-boats employed for such carriage, 5 Wend. 33; De Mott v. Laraway, 14 Wend. 225; Spencer v. Daggett, 3 Vt. 92. Cf. Beckwith v. Frisbie, 32 Vt. 559; and also Exchange Ins. Co. v. Delaware Canal Co., 10 Bosw. 180. Steamboats are common carriers; Allen v. Sewall, 2 Wend. 327; Jeneks v. Coleman, 2 Sumn. 221; Harrington v. M'Shane, 2 Watts 443; Hale v. New Jersev Steam Nav. Co., 15 Conn. 539; Bowman v. Hilton, 11 Ohio 303; 8 Humph. 497; 1 Fla. 403. In most of these cases the water carrier takes both passengers and freight, also the baggage of passengers. But a canal company which simply allows other boats to use its highway is not a common carrier; Grigsby v. Chappell, 5 Rich. 443. Nor is a towboat a common carrier, for this is a peculiar service of tugging and pulling loaded vessels; Transportation Line v. Hope, 95 U.S. 297; Caton v. Rumney, 13 Wend. 387; Wells v. Steam Nav. Co., 2 Comst. 204; Hays v. Paul, 51 Penn. St. 134; Ashmore v. Penn. Steam Towing Co., 4 Dutch. 180; 6 Cal. 462; 1 Abb. 465; 14 Bush 698; 77 Penn. St. 238. But see Sproul v. Hemmingway, 14 Pick. 1. Nor is log-driving a common carriage pursuit; Mann v. White River Log Co., 46 Mich. 38. And see, as to mud-scows, 5 Fed. R. 634.

The relation of common carrier attaches to the real bailee, the one having possession, control, and authority in the bailment; Shelden v. Robinson, 7 N. H. 157; Elkins v. Boston & Maine R., 3 Fost. 275; Citizens' Bank v. Nantucket Steamboat

Co., 2 Story 16. Actual responsibility, not mere ownership of the vehicle, is the test. The charter-party of a vessel usually determines who is the carrier; Sproul v. Hemmingway, 14 Pick. 1; 17 Barb. 191; Lamb v. Parkman, 1 Sprague 343. Similar rules apply to railroads, but the custody here is more exclusively that of the company. In cases of leased railroads, the lessee is usually held responsible; Pittsburgh R. v. Hannon, 60 Ind. 417; 42 N. Y. Super. 225; McCluer v. Manchester, etc., R., 13 Gray 124. The liability of a railroad for cars of another road drawn over its tracks for hire is strict, but quære whether this results from the peculiar terms of the contract or an implied carrier relation; Vermont R. v. Fitchburg R., 14 Allen 462; New Jersey R. v. Pennsylvania R., 27 N. J. L. 100; Coup v. Wabash R., 56 Mich. 111; 26 Minn. 243; 25 Fed. R. 317. Persons actually operating a railroad may sometimes be the real bailees, instead of the company's usual agents, as, for instance, receivers or trustees for bondholders; Paige v. Smith, 99 Mass. 395; Nichols v. Smith, 115 Mass. 332; Blumenthal v. Brainerd, 38 Vt. 40; Newell v. Smith, 49 Vt. 255; Sprague v. Smith, 29 Vt. 421; 44 N. Y. Super. 47. But a road in process of construction is not a common carrier, unless it begins business before it is complete; Kansas R. v. Fitzsimmons, 18 Kans. 34; Little Rock R. v. Glidewell, 39 Ark. 487; 23 Ohio St. 186. Nor are the contractors building the road common carriers; Shoemaker v. Kingsbury, 12 Wall. 369.

Whatever is capable of being bailed at all may be the subject of common carriage, even live animals. See Smith v. New Haven R., 12 Allen 531; Clark v. Rochester R., 14 N. Y. 570; Kansas Pacific R. v. Nichols, 9 Kans. 235; Bamberg v. South Carolina R., 9 S. C. (N. S.) 61. Some cases contra are based upon fallacious reasoning; Schouler, Carriers, § 370. Dangerous articles must be carried by one who holds himself out generally for carriage, but he may make an extra charge for the peculiar hazard involved. It is his duty to provide proper means for conveying such articles. See Boston & Albany R. v. Shanly, 107 Mass. 568; Nitro-Glycerine Case, 15 Wall. 524. In the tendency of this age to subdivide employments, a carrier, semble, might limit clearly the scope of his business, if he thus held himself out to the public. Carriers of freight are not necessarily common carriers of money, which in these days belongs rather to express carriers. See Citizens' Bank v. Nantucket

Steamboat Co., 2 Story 16; Whitmore v. Steamboat Caroline, 20 Mo. 513; Chouteau v. Steamboat St. Anthony, 20 Mo. 519; Allen v. Sewall, 2 Wend. 327; S. C., 6 Wend. 335; Farmers' Bank v. Champlain Trans. Co., 23 Vt. 186.

There is a vast variety of decisions, English and American, affecting the points to which this most interesting and complex of all bailments gives rise. It is important to consider when the bailment begins, when it ends (with the corresponding duties of delivery and redelivery, or delivery over), the carrier's rights, and particularly his right of compensation, which is secured by lien; also the remedies against him. In the space of the present note it will be impossible to discuss these questions, and the reader is referred to general works on bailments and carriers. See Schouler, Carriers, 2d ed. We shall, however, dwell somewhat upon two important points pertinent to this bailment: (a) the peculiar duty of this public vocation as to receiving what may be offered; (b) the rule of bailment responsibility.

(a) It is the duty of the common carrier to receive, without respect of persons, whatever may be offered to him for transportation, so far as comports with his means and the nature of his calling, and to take charge of its conveyance; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; Messenger v. Penn. R., 37 N. J. L. 531; Audenried v. Phil. R., 68 Penn. St. 370; McDuffee v. Portland, etc., R., 52 N. H. 430; New England Express Co. v. Maine Central R., 57 Me. 188. As we have seen in the case of the innkeeper, this party who exercises a public vocation cannot choose his own customers, but is bound to serve the public. But there are these limitations perceived as before: - (1) The party offering the chattels should offer for reasonable hire; and, what is more, the carrier may demand his reasonable recompense in advance, instead of trusting to the customer's credit or (as he usually does) to his lien upon the goods for his reward. Reasonable recompense only should be charged; and, to reënforce the common law and prevent discrimination of rates, "equality statutes" have been passed, with especial reference to railways. See also the "Interstate Commerce Act" of 1887, which marks a new era in our national jurisprudence. (2) The carrier may refuse transportation on the ground that his means are not adequate; for his duty is limited by his accommodations, and he is under no obligation

to provide for some unusual demand; Thayer v. Burchard, 99 Mass. 508; and he may decline freight where there is exposure to some extraordinary danger, or where he is under some coercion; Phelps v. Illinois Central R., 94 Ill. 548; Geismer v. Lake Shore R., 102 N. Y. 563; Pittsburgh R. v. Hollowell, 65 Ind. 88. (3) Transportation may be refused because it is not within the scope of the carrier's vocation. He may hold himself out to carry a particular description of property only, or, at least, may exclude certain kinds of chattels. See 2 Story 49. And the fair limits of his route, and the limited number of his way stations, as well as his reasonable times of receiving and of making his trips, must be regarded; Frazier v. Kansas City R., 48 Iowa 571; 61 Ind. 539. And see Schouler, Carriers, § 380, etc.

(b) Now, in detail, as to the carrier's bailment responsibility. So far as theoretical duty is concerned, the common carrier may be pronounced a bailee for mutual benefit whose duty is to exercise ordinary care and diligence as such. He must use ordinary care in loading and stowing, and in supplying proper vehicles and propelling force; Branch v. Wilmington R., 77 N. C. 347; Propeller Niagara v. Cordes, 21 How. 8; Schmidt v. Chicago R., 83 Ill. 405; The Northern Belle, 9 Wall. 526. See Merrick v. Webster, 3 Mich. 268. He is bound to carry with reasonable despatch and by the proper route; 7 Blackf. 497; Harris v. Northern Indiana R., 20 N. Y. 232; 37 La. Ann. 468; Hastings v. Pepper, 11 Pick. 41; Peet v. Chicago R., 20 Wisc. 594; 45 Barb. 502; 76 N. Y. 305; Dixon v. Chicago R., 64 Iowa 531. See, as to deviations from necessity, The Maggie Hammond, 9 Wall. 435; 11 Fed. R. 179; Crosby v. Fitch, 12 Conn. 410; Hand v. Baynes, 4 Whart. 204. If disaster occurs, the carrier must use reasonable diligence towards the property in order to make the loss as light as possible, whether in repairing or transshipping or selling the injured property; 7 Blackf. 497; Phillips v. Brigham, 26 Ga. 617; Propeller Niagara v. Cordes, 21 How. 7; 12 La. Ann. 410; 3 Bosw. 357; Houston R. v. Ham, 44 Tex. 628; The Maggie Hammond, 9 Wall. 435; Chouteaux v. Leech, 18 Penn. St. 224; 1 Mo. 81. And see The Sarah, 2 Sprague (U.S.) 31. For mere delays which are clearly reasonable, the carrier is not harshly visited; Collier v. Swinney, 16 Mo. 484; Schouler, Carriers, § 488. For lack of good faith or of ordinary care, any common carrier is responsible. But the common carrier's legal liability transcends all

questions of care and diligence. Public policy affixes a responsibility to this vocation which is extraordinary. He is, in other words, a virtual insurer against all risks of loss or injury save those (1) of loss or injury by act of God, and (2) of loss or injury by a public enemy; to which modern precedent justifies us in adding (3) of loss or injury by act of the customer himself; and one more exception we venture to add in advance of judicial announcement, viz. (4) of loss or injury by the public authority. As to loss or injury by act of God, this means such irresistible disaster as results immediately from natural causes, and is in no sense attributable to human agency. The civil law employs, as a corresponding term, vis major. "Inevitable accident" is not a fair synonym. The usual losses under this head are attributable to lightning, tempest, earthquake, flood, or sudden death, and for these the carrier is not responsible while in the line of duty; Railroad Co. v. Reeves, 10 Wall. 176; Michaels v. New York R., 30 N. Y. 564; McHenry v. Railroad Co., 4 Harring. 448, 449; 21 Wend. 190; Denny v. New York Central R., 13 Gray 481; Morrison v. Davis, 20 Penn. St. 171; Powell v. Mills, 30 Miss. 231; Nashville R. v. David, 6 Heisk. 261. And losses due to natural decay, spoliation, deterioration, and waste of the things, or the natural death of an animal, are excusable on the same principle; Warden v. Greer, 6 Watts 424; 30 Miss. 691; Ship Howard v. Wissman, 18 How. 231; Swetland v. Boston & Albany R., 102 Mass. 276; 1 Black 156; Lawrence v. Denbreens, 1 Black 170; 12 Ga. 566. Also damage caused by rain, snow, freezing, thawing, and the like; Empire Trans. Co. v. Wallace, 68 Penn. St. 302; 40 Mo. 491; Vail v. Pacific R., 63 Mo. 230; Parsons v. Hardy, 14 Wend. 215; 23 Wend. 306; 4 N. H. 259; 102 Mass. 276, 283. But, as the less violent action of the elements may be foreseen by prudent men and guarded against, due care and diligence on the carrier's part should be scrutinized. A loss by fire, however, is not by "act of God," for fire originates in human agency, and the carrier is held responsible. This is his greatest hardship at the common law; Hale v. New Jersey Steam Nav. Co., 15 Conn. 539; Parker v. Flagg, 26 Me. 181; Moore v. Michigan R., 3 Mich. 23; Cox v. Peterson, 30 Ala. 608; Singleton v. Hilliard, 1 Strobh. 203; 9 Penn. St. 114; 1 Sm. & Marsh. 279; 2 Tex. 115. Cf. Miller v. Steam Nav. Co., 6 Seld. 431; and Pennsylvania R. v. Fries, 87 Penn. St. 234. Nor is the explosion of a steam boiler thus excusable; The Bark Edwin, 24 How. 386; 1 Cliff. 322; 1 Sprague 477; 5 Strobh. 119; 8 Wall. 153. Carriers by water are excused if the vessel strikes a hidden and unknown rock, snag, shallow, or bar, and human agency is not the prominent element in the causation; Williams v. Grant, 1 Conn. 487; 2 Bailey 421; Steele v. McTyer, 31 Ala. 667. But see Friend v. Woods, 6 Gratt. 189. Aliter if those obstructions were all denoted on charts, so that there is carelessness in navigating; Collier v. Valentine, 11 Mo. 299; 5 Harring. 238. But loss through the sinking of a boat, a mast, an anchor, or other similar obstruction, is due to human agency, and not excusable; Merritt v. Earle, 29 N. Y. 115, 121; New Brunswick Steamboat Co. v. Tiers, 24 N. J. L. 697; 2 Speer 197. Nor accidents through false lights, collision, etc.; Plaisted v. Boston Steam Nav. Co., 26 Me. 132; Mershon v. Hobensack, 2 Zab. 372. Jettison is or is not excusable according to circumstances. See Price v. Hartshorn, 44 N. Y. 94; The Portsmouth, 9 Wall. 682; 17 How. 100; 14 Wall. 579. Damage by rats or other vermin is no "act of God;" 1 Murph. 173; Hazard v. New England Ins. Co., 8 Pet. 557; The Northern Belle, 9 Wall. 526. Cf. Schouler, Carriers, § 415. As to loss or injury by public enemies, we mean those with whom the government which prescribes these conditions of carriage contract is at open war. In this sense our Confederate insurgents in 1861 were public enemies; McCranie v. Wood, 24 La. Ann. 406; 1 Duv. 232; Lewis v. Ludwick, 6 Cold. 368; 29 Md. 330; 10 Lea 749; 1 Flip. 85. Cf. 14 Rich. 181. And see 9 Allen 299. Hostile Indian tribes on the frontier are also deemed public enemies; Holladay v. Kennard, 12 Wall. 254. But the violence of mobs, rioters, and insurgents constitutes no such exception; and here is the second great hardship of the common carrier at our law. Observe Lord Holt's remark on this point; supra, p. 365. But acts of pirates come within our exception, and so, semble, should acts of privateers. Schouler, Carriers, § 420. As to loss or injury by act of the customer himself, whenever the consignor has, by himself or his servants, wilfully, fraudulently, or simply in negligent disregard of his own duty as bailor, occasioned the loss, the carrier may show this in justification; Choate v. Crowninshield, 3 Cliff. 184; Klauber v. American Express Co., 21 Wise.

21; Stimson v. Jackson, 58 N. H. 138; Congar v. Chicago R., 24 Wise. 157; Ross v. Troy & Boston R., 49 Vt. 364; 20 N. Y. 232; 22 Wall. 123; 102 Mass. 557; Nitro-Glycerine Case, 15 Wall. 524; 42 Ill. 458; 107 Mass. 568; 2 Sprague 35. As where the customer misdirects the goods, packs them badly, makes them appear less valuable, less dangerous, or altogether of another kind than they really are. If the customer used deception as to the contents, and purposely threw the carrier off his guard, all the more should he be made liable. But in such cases the carrier will be excused only when the customer's act and not his own default was the primary cause of the loss; Hyde v. New York Steamship Co., 17 La. Ann. 29; Union Express Co. v. Graham, 26 Ohio St. 595; Shriver v. Sioux City R., 24 Minn. 506; Wiggin v. Boston & Albany R., 102 Cass. 201. As to our fourth exception, loss or injury by the public authority, the rule seems to be that a direct act of sovereignty, such as embargo, or a military seizure or impressment, by the carrier's own government, will excuse him. See Phelps v. Illinois Central R., 94 Ill. 548; Wells v. Maine S. S. Co., 4 Cliff. 228; Nashville R. v. Estes, 10 Lea 749. Some cases hold that a wrongful attachment or seizure by a judicial officer of the courts does not excuse the carrier; Edwards v. White Line Trans. Co., 104 Mass. 159; 117 Mass. 591; Faust v. South Carolina R., 8 S. C. 118. But where the carrier yields to a legal seizure or attachment of the goods, and gives his customer due notice to defend, it seems he should be exonerated; Wells v. Maine S. S. Co., 4 Cliff. 228; Stiles v. Davis, 1 Black 101; 51 Ind. 181. If the seizure be because of the carrier's own fault, of course he is responsible; Howland v. Greenway, 22 How. 491; 15 N. Y. Supr. 73.

We may add, generally, that for the negligence, default, fraud, or misconduct of his own servants the carrier is responsible; 1 Bosw. 77; Winter v. Pacific R., 41 Mo. 503; 11 Wend. 571; 19 N. H. 122; Boscowitz v. Adams Express Co., 93 Ill. 523; 11 Pet. 213. And fraud or misconduct on his or their part is even more culpable than negligence. The railroad company which an express employs to transport goods is the express company's servant pro hac vice; Bank of Kentucky v. Adams Express Co., 93 U. S. 174. But employés who have struck and severed their relation cannot bind the carrier for their acts in any such sense; Geismer v. Lake Shore R., 102 N.

Y. 563; Pittsburg R. v. Hollowell, 65 Ind. 188. In all cases where a legal excuse for loss or injury is set up, the proximate and remote cause of the mischief must be regarded. If the carrier has failed to exercise ordinary care, and thus induces or enhances the loss or injury, he is responsible, although any of the four above named exceptions operated remotely; Schouler, Carriers, §§ 431–439. The care and diligence requisite on the carrier's part must be according to the circumstances of the particular case.

As in other bailments, the carrier's responsibility may be found qualified by usage, special contract, and legislation; and these points we shall now consider separately. First, as to usage; this works within rather narrow and well recognized limits. The usage among ordinarily prudent carriers of the same class may largely determine what care and skill should be employed, and how one's duty should be performed; 1 Blatchf. 526; 2 Sumn. 567; Rich v. Lambert, 12 How. 347. As in the usage among express companies of sealing a valuable package; 7 Col. 43. Usage, we may add, cannot transcend the bounds of public policy, and it modifies a contract only so far as some uniform, reasonable, and continuous business method of the locality may have influenced the mutual intent of both parties concerned in a particular transaction. Second, as to special contract. The present American rule, which has fluctuated differently from that of England, is that common carriers may, by special agreement, stipulate for a less degree of responsibility than the common law imposes; thereby divesting themselves of the extraordinary risks of an insurer; but that they cannot exempt themselves from the duties of ordinary bailees for hire, nor from liability for the culpable negligence, fraud, or misconduct of themselves or their agents; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344 (1848); Slocum v. Fairchild, 7 Hill 292; Wells v. Steam Nav. Co., 4 Seld. 375; Kirkland v. Dinsmore, 62 N. Y. 171; Camp v. Hartford Steamboat Co., 43 Conn. 333; 98 Mass. 239; Sager v. Portsmouth R., 31 Me. 228; Hoadley v. Northern Trans. Co., 115 Mass. 304; Davidson v. Graham, 2 Ohio St. 131; 4 Ohio St. 362; Field v. Chicago R., 71 Ill. 458; Camden R. r. Baldauf, 16 Penn. St. 67; 32 Penn. St. 414; Michigan Central R. v. Hale, 6 Mich. 243; Hooper v. Wells, 27 Cal. 11; Rice v. Kansas Pacific R., 63 Mo. 314; York Co. v. Central R., 3 Wall.

107; Swindler v. Hilliard, 2 Rich. 286; Boorman v. American Express Co., 21 Wisc. 152. See Schouler, Carriers, §§ 453-455. That the carrier cannot by special stipulation exempt himself from liability for the fraud, misconduct, or ordinary negligence of himself or his servants, even in the transportation of animals. See Railroad Co. v. Lockwood, 17 Wall. 357, and cases cited; Reno v. Hogan, 12 B. Mon. 63; Union Express Co. v. Graham, 26 Ohio St. 595; Snider v. Adams Express Co., 63 Mo. 376; Mann v. Birchard, 40 Vt. 326; Bank of Kentucky v. Adams Express Co., 93 U. S. 174; Christenson v. American Express Co., 15 Minn. 270; 102 Mass. 552; 24 Minn. 506. The New York courts still nominally maintain a contrary view. See 97 N. Y. 87; 71 N. Y. 180. But the influence of the latest decisions is against exempting a carrier from liability for his own negligence, inasmuch as they refuse to construe the contract as intending in terms any such exemption.

It appears to be also the general American view that if the special stipulation be that the carrier shall give a lower rate of recompense, quicker transportation, or some other genuine consideration for a reduction of his legal risks, his special contract is favored all the more; Dillard v. Louisville R., 2 Lea 288. Yet as States are free to make each its rule, except for the interstate influence of the Supreme Court of the United States, which tends to harmonize the decisions, we must not expect to find one general rule uniformly stated and applied. In some instances the standard is held with a feeble grasp, the court not clearly defining what degree of "negligence" (whether ordinary or gross) is inexcusable under any variation of one's engagement. Nor has exceptional liability for the acts of a carrier's servants been clearly defined. Our inference is that, here and with the innkeeper, the exceptional bailee is liable for his servant's negligence or misconduct as for his own, and hence that the usual limitations of agency or service, as between negligence and a positive wrong committed by the servant, do not here avail as they would in an ordinary bailment for hire. Medfield v. Boston R., 102 Mass. 552; Shriver v. Sioux City R., 24 Minn. 506. See contra Higgins v. New Orleans R., 28 La. Ann. 133; 97 N. Y. 87. It is lately decided that the carrier has a right to stipulate for a fixed valuation of what he carries, which, if reasonable, shall conclude his customer in case of loss or injury; Hart v. Pennsylvania

R., 112 U. S. 331, and cases cited; Graves v. Lake Shore R., 137 Mass. 33. States on this question have much varied; Ib.; Schouler, Carriers, § 457. Under the American rule which we have stated the common carrier may of course divest himself of all liability for loss by fire occurring without his fault; York Co. v. Central R., 3 Wall. 107; Germania Fire Ins. Co. v. Memphis R., 72 N. Y. 90; Pemberton Co. v. N. Y. Central R., 104 Mass. 144; Grace v. Adams, 100 Mass. 505; 2 Rich. 286. But not where the fire was occasioned by the negligence of himself or his servants; Bank of Kentucky v. Adams Express Co., 93 U. S. 174; 43 N. Y. 123; 31 Ala. 501; 32 Penn. St. 414; 28 Ohio St. 358; 6 Mich. 243; Empire Trans. Co. v. Wamsutta Oil Co., 63 Penn. St. 14; 18 Fed. R. 318; Little Rock R. v. Talbot, 39 Ark. 523; 14 Bush 590; 58 Miss. 911; Chicago R. v. Moss, 60 Miss. 1003. Special stipulations, too, are valid against damage of sea or river, losses by unavoidable accident, by thieves, mobs, riots, and the like; Davidson v. Graham, 2 Ohio St. 131; (Tenn.) 1 S. W. 102. Bills of lading, which were first introduced in carriage by water, are in modern times full of qualifications like these. See Schouler, Carriers, § 446. A reasonable limit may be put to the time and method of presenting claims for loss or damage to the carrier; but not so as to deprive the consignee of a fair opportunity to inspect the property upon its arrival; Express Co. v. Caldwell, 21 Wall. 264; commenting on 44 Ala. 101; Southern Express Co. v. Hunnicutt, 54 Miss. 566; 51 Ind. 127; Westcott v. Fargo, 61 N. Y. 542; 67 How. Pr. 103; Rice v. Kansas Pacific R., 63 Mo. 314; and also 29 Ind. 21; 77 N. C. 355; 4 S. C. N. S. 135; 9 Baxt. 188. Various other qualifications are introduced, which, of course, must not be unreasonable or obnoxious to public policy; Schouler, Carriers, §§ 449, 458. A carrier, moreover, may enlarge his risk by a special agreement so as to make his responsibility absolute, but so onerous an undertaking should be very clearly manifest; 10 Wall. 176; 1 Black 156: 50 Me. 339; 105 Mass. 437; 9 Wall. 161; 47 Iowa 229. As to the method of making a special contract, general notices such as the English courts sanctioned have never been favored in this country. By the common American rule, some evidence aliunde of the bailor's assent to the qualified liability is required in such cases, at all events; the mere publishing of the notice not being considered sufficient; Schouler, Carriers,

 $\S 463$; Kimball v. Rutland R., 26 Vt. 485; Jones v. Voorhees, 10 Ohio 145; Dorr v. New Jersey Steam Nav. Co., 1 Kern. 485; Blossom v. Dodd, 43 N. Y. 264; Judson v. Western R., 6 Allen 486; 6 Mich. 243; 2 Ohio St. 131; 4 Fost. 71; 6 How. 344-385. Some of these cases disregard general notices altogether. But in America, as in England, saving legislative restrictions on this point, the common carrier may qualify his bailment responsibility, within such limits as may be lawful, by any express contract, oral or written. If the sender's special assent also appears, all the better; but this is not in every case indispensable. Inferential assent is in many cases sufficient to bind the shipper. Thus in bills of lading the silent reception by the consignor of this time-honored document for carriage by water binds him to any and all special conditions contained therein which are permissible; Sears v. Wingate, 3 Allen 103; The Keokuk, 9 Wall. 517; Pollard v. Vinton, 15 Otto 7; The Delaware, 14 Wall. 579. Even though he does not read it; Germania Fire Ins. Co. v. Memphis R., 72 N. Y. 90; 100 Mass. 505; 44 Wisc. 405; 115 Mass. 304. As to whether there has been a like assent by implication where railway bills of lading, receipts, tickets, and the like, are taken silently, there is some conflict of our authorities. Six separate elements for consideration may aid, however, in reconciling the decisions. These are: (1) The character of the document given into the sender's hands. A bill of lading, which is both a receipt and a contract, is a solemn and needful voucher, and a document of transfer, and as such should not be received without a reading of its terms. There is an inclination to treat railway bills of lading or waybills as documents of an equally high character. See Farmers', etc., Bank v. Erie R., 72 N. Y. 188; Mulligan v. Illinois Central R., 36 Iowa 181; Morrison v. Phillips Co., 44 Wisc. 405; Wichita Savings Bank v. Atchison R., 20 Kans. 519; Fairfax v. N. Y. Central R., 73 N. Y. 167; Louisville R. v. Brownlee, 14 Bush 590; O'Bryan v. Kinney, 74 Mo. 125. But the mere receipts of express or miscellaneous land carriers are of less consequence naturally, being mainly for a customer's convenience, and not negotiable as a document of title. See Grace v. Adams, 100 Mass. 505, distinguishing former cases decided in that State; Boorman v. American Express Co., 21 Wisc. 152; Kirkland v. Dinsmore, 62 N. Y. 171; 63 Mo. 376; Hadd v. U. S. Express Co., 52 Vt. 335; Madan v. Sherard, 73

N. Y. 329. In some States the question of actual assent to a railway or express document is for the jury, there being no presumption that reception is assent; Illinois Central R. v. Frankenberg, 54 Ill. 88; Adams Express Co. v. Stettaners, 61 Ill. 184; 86 Ill. 71; 89 Ill. 43, 152; 90 Ill. 455. But in others the tendency is to treat even an express document as more than a receipt, as in fact an inland bill of lading. As to tickets, these are still less to be considered as binding one who buys to their conditions as to baggage by a mere reception; Blossom v. Dodd, 43 N. Y. 264; 48 N. Y. 212; Malone v. Boston & Worcester R., 12 Gray 388; Verner v. Sweitzer, 32 Penn. St. 208. But if the shipper reads in season these lesser documents, he is bound by such special terms, legally admissible, as they contain. (2) Fairness on the part of the carrier. Any device whose effect is to trick the customer, such as fine print, abbreviations or initials, vague expressions, obliteration of words or placing important phrases on the back of the paper or in a place where they would not naturally attract his attention, will prevent an inference of the customer's assent to the carrier's terms: Brittan v. Barnaby, 21 How. 527; 98 Mass. 249; 32 Penn. St. 208; 43 N. Y. 264; 4 Bosw. 225; 10 Ohio 145; 73 N. Y. 329. And see 16 Penn. St. 67; 44 Wisc. 405. So, too, where the paper is given to some illiterate foreigner, with no effort to translate, or at some time and place where the special terms could not be read over at the time. In all such cases fraudulent intention is not essential to debar the carrier; but the fact that he has put his customer at serious disadvantage prevents him from insisting on special terms, unless it appears that the customer actually knew of them in good season. (3) Seasonableness of the announcement of special terms of carriage. If made after the goods are put in transit, the special conditions are of no avail, for the bailment has taken place as though there were no such terms; Bostwick v. Baltimore & Ohio R., 45 N. Y. 712; 23 N. Y. Supr. 278; Gott v. Dinsmore, 111 Mass. 45; Gaines v. Union Trans. Co., 28 Ohio St. 418; 90 Ill. 455; 91 Ill. 268; 74 Mo. 125; 17 Mich. 296; 47 Iowa 272. (4) Notice given to the proper party. While one may stipulate specially by means of his agent in due season, the sender's agent to deliver to the carrier is not necessarily his agent to bind him to special conditions of carriage; Fillebrown v. Grand Trunk R., 55 Me. 462; Express Co., 97 Mass. 124.

(5) Whether there has been honesty and fair dealing on the part of the consignor; Orange Co. Bank v. Brown, 9 Wend. 115; Nitro-Glycerine Case, 15 Wall. 524; Oppenheimer v. Express Co., 69 Ill. 62; Fry v. Louisville R., 103 Ind. 265. (6) Whether there are circumstances from which a waiver by the carrier of his own conditions expressed in some document may be implied. Waiver in one instance does not necessarily import a waiver in another: Minter v. Pacific R., 41 Mo. 503; 69 Ill. 62. Taking, then, these six points into consideration, if the carrier puts his bill of lading or other document which qualifies his liability into the sender's hands, and the latter declines to be bound by its terms, the carrier may demand larger rates for carrying as insurer, provided this extra charge be not on the whole unreasonable; Kirkland v. Dinsmore, 62 N. Y. 171, 179. But one cannot refuse to carry the goods at all because his terms are not assented to; Kansas Pacific R. v. Reynolds, 17 Kans. 251. Special contracts may, of course, be made, involving the sender's express consent; and special stipulations may be written, printed, or simply oral. Unlike the English railway and canal traffic act, our common carriage in this country is not often affected by statute, so that the sender's written assent to his carrier's special terms is not requisite. The ordinary rules of evidence will determine whether a special contract has been entered into; American Trans. Co. v. Moore, 5 Mich. 368; 21 Ga. 526; 15 La. Ann. 103. Where there is no such estoppel to conclude the question as results from receiving silently the bill of lading, etc., of which we have spoken, mutual assent is a matter of fact, to be proven from writings, or mutual words, acts, conduct, and the attendant circumstances; 28 Ohio St. 418; 21 Wisc. 152, 158; Merchants' Trans. Co. v. Leysor, 89 Ill. 43. Usually, however, it is a question of law as to what constitutes per se a special contract; 26 Vt. 247. See 71 Ill. 458. Third, as to legislation. We have in this country no such statutes of general scope as the English carriers' acts or railway and canal traffic act. There are statutes which lessen the legal risks of transportation as to certain carriers and specified kinds of property; and more especially as to those whose perilous transportation is by water, or the carriage of valuables, like gold, silver, jewelry. and precious stones. See U. S. Rev. Stats. (1873) §§ 4281-4289. Or of unknown explosives; Ib. §§ 4278-4280, 4288. We

have legislation in many States to prevent unfair discriminations and unequal or excessive rates; and the recent act of Congress for interstate commerce, whose practical influence is beginning to be tested; their application is chiefly to railway carriers. See U.S. Stats. 1886–1887, c. 104. Local enactments affect somewhat the liability of the carrier in the transportation of animals; 68 Ga. 644; 15 Fed. R. 209.

Wherever a common carrier's liability comes into question, the rule of proximate and remote cause of disaster is applied; and, while the general doctrine of bailments influences the case, courts and counsel have shown much astuteness to determine where lies the burden of proof. There is some conflict in the decisions, and the line runs very finely; but the main principles to be extracted are as follows: The carrier is an insurer, and yet culpable negligence is not presumable on the part of any one; but to discourage litigation the common law presumes strongly against every transporter to whom in the regular course of business property has been consigned for carriage which fails in due time to reach its destination reasonably safe and sound. Proof to this extent of an owner's or customer's loss or injury establishes primâ facie the liability of the carrier to make good that loss or injury; but, while the customer need not prove where or how the mischief happened, he should show a complete delivery to the carrier, and, further, that the goods in question were delivered over at the end of the transit in the damaged or wasted condition complained of, or not delivered at all; his showing must be such as leaves it improbable that the loss or injury could have occurred from any other cause than such as leaves the carrier liable; The Falcon, 2 Blatchf. 64; 1 Cal. 168; 3 Woods 380; Schouler, Carriers, § 439. And whenever the carrier has in response brought the loss fairly within one of the legal exceptions we have stated - act of God, act of public enemy, act of consignor or customer, or act of public authority - by ample evidence to that effect, such as imputes no blame to himself, he is not bound to show further affirmatively that there was in fact no contributory negligence or misconduct on his part; he may here rest his case, and leave the other to show such negligence or misconduct as proximate cause of the mischief by way of rebutting testimony if he can; Ib; Vail v. Pacific R., 63 Mo. 230; Railroad Co. v. Reeve, 10 Wall. 176. Where there is a special contract exemption - fire, for

instance - non-delivery of the goods, or their delivery at the end of the transit in an injured state, puts the burden of exemption, as before, upon the carrier; who, for immunity, ought in the present case to bring himself by proof within the terms of his special engagement. And where the bill of lading or receipt shows the package to have been in good condition when shipped, and the sender proves that his own duty was performed, the burden is upon the carrier; 28 Fed. R. 336; Canfield v. Baltimore R., 93 N. Y. 532. But this doctrine is fairly established, that wherever the carrier, under a special contract, shows, without compromising himself, that the loss or injury was from one of the expressly excepted causes of that contract - as by fire, for instance - he repels at once the presumption which his failure to successfully perform the transit raised against him; Clark v. Barnwell, 12 How. 272; Transportation Co. v. Downer, 11 Wall. 129; Lamb v. Camden & Amboy R., 46 N. Y. 271; 49 N. Y. 249; Farnham v. Camden & Amboy R., 55 Penn. St. 53; 67 Penn. St. 211; 13 La. Ann. 269; 8 Ben. 301. The party claiming damage may now proceed to show such culpable negligence or misconduct on the carrier's part as really occasioned the loss in question and ought, therefore, to leave him still chargeable; but the burden of doing so devolves upon this party, no such remissness having been established on the carrier's own showing, and the fact of such special stipulation not being controverted. Schouler, Carriers, § 478. We should add, however, that the rule of some States is so far hostile to these special exemptions on a carrier's part as to impose upon him, in general, the burden of showing affirmatively that the loss in question was occasioned without his fault; Union Express Co. v. Graham, 26 Ohio St. 595; 28 Ohio St. 144; Swindler v. Hilliard, 2 Rich. 286; 9 Rich. 201; Berry v. Cooper, 28 Ga. 343. There is good sense in such a rule. An extreme instance where this latter view would be meritorious may be supposed in case a carrier of crockery stipulated "not liable for breakage," and the goods came broken; for such a stipulation is a peculiar one, and it is much easier for a carrier to show that he was not culpable, than for the sender or owner to show that he was; it is a stronger case than that of loss by fire. where either party may investigate the facts. All this discussion shows that suits against these public transporters are fought at close quarters, each party manœuvring for the advantage. As to the burden of proof in bailments generally, the rule is not uniformly stated, but the bailee should exonerate himself, by the better opinion, after the bailor makes out the same primâ facie case of negligence. But in ordinary bailments exoneration is mostly to the simple point of exerting due diligence, while here it is rather for warding off the legal risks of an insurer, which complicates the inquiry. See Schouler, Bailm. § 23.

11. Carriers of passengers and baggage. — The carriage of passengers is not strictly a bailment, for the transaction concerns human beings instead of personal property. Yet in the exercise of this public vocation are found legal principles analogous to those which we have discussed in this note. Schouler, Carriers, Part VII. passim. But the carriage of a passenger's baggage is a bailment, and follows our general rules of freight and common carriage. The peculiarity of baggage transportation is that no contract is made for carrying such property as in ordinary freight, but the duty of conveying it as common carrier is incidental to the differently graded duty of carrying the passenger himself. For one who pays his personal fare is entitled to have his suitable baggage taken likewise without extra charge. Schouler, Carriers, § 665. By "baggage" are meant such articles of personal necessity, comfort, convenience, or recreation, as travellers, under the circumstances, are wont to take on their journey. Trunks, valises, carpet-bags, chests, and the like, with their common travelling contents, for instance; shoes, wearing apparel, one's watch and personal jewelry; also, if needful to carry about and not purely for the destination, even such articles as a mechanic's tools, a surgeon's instruments, a student's books, a sportsman's gun or fishingtackle or weapons of defence on a dangerous journey; Parmelee v. Fischer, 22 Ill. 212; Hannibal R. v. Swift, 12 Wall. 262; Porter v. Hildebrand, 14 Penn. St. 129; Kansas City R. v. Morrison, 34 Kans. 502; Gleason v. Goodrich Trans. Co., 32 Wisc. 85; Baltimore Steam Packet Co. v. Smith, 23 Md. 402; Collins v. Boston & Maine R., 10 Cush. 506; Dexter v. Syracuse R., 42 N. Y. 326; 10 Ohio 145; 4 E. D. Smith 181; 6 Ind. 242; 3 Penn. St. 451; Amer. Cont. Co. v. Cross, 8 Bush 472; 2 Bosw. 589; Miss. R. v. Kennedy, 41 Miss. 671; Pardee v. Drew, 25 Wend. 459; Stimson v. Conn. River R., 98 Mass. 83. Money to a reasonable amount may be bonû fide included as baggage;

Merrill v. Grinnell, 30 N. Y. 594; 4 E. D. Smith 178; Jordan v. Fall River, 5 Cush. 69; Illinois Central R., 24 Ill. 332; 11 Humph. 419. But not money or valuables in large amounts, far beyond what is needful for the journey; 9 Wend. 85; Davis v. Michigan R., 22 Ill. 278; 6 Ind. 242; Michigan Central R. v. Carrow, 73 Ill. 348. Wearing apparel, laces, etc., worth \$10,000, but suitable to the rank and station of a very wealthy lady, were allowed in N. Y. Central R. v. Fraloff, 100 U. S. 24, which is an extreme instance. And see 42 N. Y. 326. Furniture for use at the journey's end is not baggage; Connolly v. Warren, 106 Mass. 146; 4 Bosw. 225. Though the chair, etc., of an invalid traveller may be; Ouimit v. Henshaw, 35 Vt. 604; 22 Ill. 212. Nor is a sample trunk; Alling v. Boston & Albany R., 126 Mass. 121; Pennsylvania R. v. Miller, 35 Ohio St. 541; 17 Fed. R. 209. Nor any articles of merchandise not property of other persons in general from whom the passenger carrier derives no advantage; 4 Bosw. 225; Chicago R. v. Boyce, 73 Ill. 510. The liability for baggage is that of a common carrier, on pure bailment principles, the passenger's fare being the recompense; 19 Wend. 234; 6 Hill 586; 1 Strobh. 468; 6 Ohio 358; Morrill v. Grinnell, 30 N. Y. 594; Smith v. Boston & Maine R., 44 N. H. 325, 330; 100 U. S. 24; 3 Penn. St. 451; 21 Wend. 354; Dill v. South Carolina R., 7 Rich. 158; Hannibal R. v. Swift, 12 Wall. 263; Dunlap v. International Steamboat Co., 98 Mass. 371. That is to say, the carrier is liable for loss or injury unless occasioned by act of God, act of public enemy, act of passenger, or act of public authority. As to liability for things not strictly baggage, but carried as such, if there be good faith on the passenger's part the tendency is to hold the carrier responsible as a carrier of freight, or at least as a gratuitous carrier; 36 Barb. 557; 10 Cush. 506; Sloman v. Great Western R., 67 N. Y. 208; Perley v. N. Y. Central R., 65 N. Y. 374; 17 Fed. R. 209. And see Minder v. Pacific R., 41 Mo. 503; N. Y. Central R. v. Fraloff, 100 U.S. 24. But there is some uncertainty; Schouler, Carriers, §§ 673, 674. Fraud in the passenger's conduct, his device or artifice, may absolve the carrier; but it is for the latter to ask, if he chooses, the value of the baggage offered, and he may charge for baggage excessive in weight or value. The rule is that passenger and baggage shall go together; Wilson v. Grand Trunk R., 56 Me. 60; 73 N. Y. 167; 11 Rob. (La.) 24. In the

case of hand-baggage, there appears properly a mixed custody and liability, though it is sometimes said that where the passenger keeps the articles exclusively about his person, the carrier is not trusted and is not liable; Schouler, Carriers, §§ 680-682; Whitney v. Pullman Car Co., (Mass.) 9 N. E. 619; 32 Wise. 85; Clark v. Burns, 118 Mass. 275; 16 B. Mon. 302; Abbott v. Bradstreet, 55 Me. 530; Tower v. Utica R., 7 Hill 7; 73 Ill. 360; 125 Mass. 54. Special stipulations which limit the weight or value of baggage are the most common; 16 Penn. St. 67; 12 Gray 388; 4 Bosw. 225; 2 Ohio St. 131; 10 Ohio 145; 6 Blatchf. 64; Blossom v. Dodd, 43 N. Y. 264; 23 Fed. R. 765; Rawson v. Penn. R., 48 N. Y. 212; 16 N. Y. Supr. 322; (Mass.) 9 N. E. 615; 73 N. Y. 329; 32 Penn. St. 208; Steers v. Liverpool Steamship Co., 57 N. Y. 1; (Cal.) 11 Pac. 686. All special contract terms must be consonant with public policy, and must also be seasonably brought to the passenger's knowledge; Schouler, Carriers, §§ 689, 690.

ASHBY v. WHITE ET ALIOS.

TRINITY. - 2 ANNÆ.

[REPORTED LORD RAYMOND, 938.]

A man who has a right to vote at an election for members of parliament may maintain an action against the returning officer for refusing to admit his vote, though his right was never determined in parliament, and though the persons for whom he offered to vote were elected (a).

Buckinghamshire to wit. Matthias Ashby complains of William White, Richard Talbois, William Bell, and Richard Heydon, being in the custody of the marshal of the Marshalsea of the lord the king, before the king himself, for that, to wit, That whereas, on the 26th day of November, in the 12th year of the reign of the lord the now king, a certain writ of the said lord the now king, issued out of the Court of Chancery of him the said lord the now king, at Westminster, in the county of Middlesex, directed to the then sheriff of Buckinghamshire aforesaid, reciting that the said lord the king, by the advice and assent of his council, for certain arduous and urgent businesses concerning him the said lord the king, the state, and the defence of his realm of England, and of the church of England,

(a) S. C. Salk. 19. 3 Salk. 17. Holt. 524, 6 Mod. 45. Vide 1 Bro. Parl. Cas. 47. 8 St. Tr. 89. Somewhat similar to this action is that of Perring v. Harris, 2 Moo. & Rob. 5, against an overseer for maliciously omitting a parishioner's name from the rate, per quod she was unable to obtain a beer license. So, against a sheriff for delaying to exe-

cute a writ, per quod the plaintiff incurred unnecessary costs. Mason v. Paynter, 1 Q. B. 974. So against an officer of customs, for refusing to sign a bill of entry, without payment of an excessive duty, Barry v. Arnaud, 10 A. & E. 646. See as to an action against a clergyman for refusing to marry, Davis v. Black, 1 Q. B. 900.

had ordained his certain parliament to be holden at his city of Westminster, on the 6th day of February, then next coming, and there with the prelates, nobles, and peers of his said kingdom, to have discourse and treaty, the said lord the now king commanded the then sheriff of Buckinghamshire, by the said writ firmly enjoining, that, having made proclamation in his next said county court after the receipt of the same writ to be holden, of the day and place aforesaid, two knights, girded with swords, the most fitting and discreet of the county aforesaid, and of every city of that county two citizens, and of every borough two burgesses of the more discreet and most sufficient, should be freely and indifferently chosen by those whom such proclamation should concern, according to the form of the statute thereupon made and provided, and the names of the said knights, citizens, and burgesses, so to be chosen, to be inserted in certain indentures thereof, to be made between him, the then sheriff, and those who should be concerned at such election (although such person to be chosen should be present or absent), and should cause them to come at the said day and place; so that they the said knights, citizens, and burgesses might severally have full and sufficient power for themselves and the commonalty of the county, cities, and boroughs aforesaid, to do and consent to those things which should then happen to be ordained there of the common council of the said realm of him the said lord the now king (by God's assistance), upon the businesses aforesaid; so that for want of such power, or because of an improvident election of the knights, citizens, and burgesses aforesaid, the said businesses might not in any wise remain undone; and should certify, without delay, that election made in the full county of him the then sheriff, distinctly and openly, under his seal, and the seals of those who should be concerned at that election, to the said lord the now king, in his Chancery, at the said day and place; sending to him the said lord the king the counterpart of the indenture aforesaid, sewed to the same writ, together with that writ; which said writ, afterwards, and before the 6th day of February in the writ aforesaid mentioned, to wit, on the 29th day of December, in the twelfth year abovesaid, at the borough of Aylesbury, in the said county of Bucks, was delivered to one Robert Weedon, Esq., then sheriff of the same county of Bucks, to be executed in form of law; by virtue of which said

writ, the aforesaid Robert Weedon, being then and there sheriff of the county of Bucks aforesaid, as before is set forth, afterwards and before the aforesaid 6th day of February, to wit, on the 30th day of December, in the 12th year abovesaid, at the Borough of Aylesbury aforesaid, in the said county of Bucks, made his certain precept in writing, under the seal of him the said Robert Weedon, of his office of Sheriff of the County of Bucks aforesaid, directed to the constables of the borough of Aylesbury aforesaid, reciting the day and place of the parliament aforesaid to be holden, thereby requiring them and giving to them in command, that having made proclamation within the borough aforesaid of the day and place in the same precept recited, they should cause to be freely and indifferently chosen two burgesses of that borough, of the more discreet and most sufficient, by those whom such proclamation should concern, according to the form of the statutes in such cases made and provided, and the names of the said burgesses so elected (although they should be present or absent) to be inserted in certain indentures between the said sheriff and those who should have interest in such election; and that he should cause them to come at the day and place in the same precept recited. so that the said burgesses might have full and sufficient power for themselves and the commonalty of the borough aforesaid, to do and consent to those things which should then happen to be ordained there of the common council of the said realm (by God's assistance) upon the business aforesaid; so that for want of such power, or because of an improvident election of the burgesses aforesaid, the said businesses might not remain undone; and that they should, without delay, certify the election to him the said then sheriff, sending to the same sheriff the counterpart of the indenture aforesaid annexed to the said precept, that he the said sheriff might certify the same to the said lord the king in his Chancery at the day and place aforesaid, which said precept afterwards and before the said 6th day of February, to wit, on the same 30th day of December in the year abovesaid, at the borough of Aylesbury aforesaid, in the said county of Bucks, was delivered to them the said William White, Richard Talbois, William Bell, and Richard Heydon, then, and until after the return of the same writ, being constables of the borough of Aylesbury aforesaid, to be executed in form of law: to which said William White, Richard Talbois,

William Bell, and Richard Heydon, by reason of their office of constables of the borough aforesaid, the execution of that precept of right did then and there belong; by virtue of which said precept, and by force of the writ aforesaid, they the said burgesses of the borough of Aylesbury, being in that behalf duly forewarned, afterwards and before the 6th day of February, to wit, on the 6th day of January in the 12th year abovesaid, at the borough of Aylesbury aforesaid, before them the said William White, Richard Talbois, William Bell, and Richard Heydon, the constables aforesaid, were assembled to elect two burgesses for the borough, according to the exigency of the writ and precept aforesaid, and during that assembly, to that intention, and before such two burgesses, by virtue of the writ and precept aforesaid, were elected, to wit, on the day and year last abovesaid, at the borough of Aylesbury aforesaid, in the county aforesaid, he, the said Matthias Ashby, then and there, being a burgess and an inhabitant of the borough aforesaid, and not receiving alms there or anywhere else, then or before, but being duly qualified and entitled to give his vote for the choosing of two burgesses for the borough aforesaid, according to the exigency of the writ and precept aforesaid, before them the said William White, Richard Talbois, William Bell, and Richard Heydon, the four constables of that borough, to whom then and there it did duly belong to take and allow the vote of him the said Matthias Ashby, of and in the premises, was ready and offered to give his vote for choosing Thomas Lee, Bart., and Simon Mayne, Esq., two burgesses for that parliament, by virtue and according to the exigency of the writ and precept aforesaid; and the vote of him, the said Matthias, then and there of right ought to have been admitted; and the aforesaid William White, Richard Talbois, William Bell, and Richard Heydon, so being then and there constables of the borough aforesaid, were then and there requested to receive and allow the vote of him the said Matthias Ashby, in the premises; nevertheless they, the said William White, Richard Talbois, William Bell, and Richard Heydon, being then and there constables of the borough aforesaid, well knowing the premises, but contriving, and fraudulently and maliciously intending to damnify him the said Matthias Ashby, in this behalf, and wholly to hinder and disappoint him of his privilege of and in the premises, did then and there hinder him, the said Matthias Ashby, to give his vote in that behalf, and did then and there absolutely refuse to permit him, the said Matthias Ashby, to give his vote for choosing two burgesses for that borough to the parliament aforesaid, and did not receive nor did they allow the vote of him, the said Matthias Ashby, for that election: and two burgesses of that borough were elected for the parliament aforesaid (he, the said Matthias Ashby, being excluded, as before is set forth) without any vote of him, the said Matthias Ashby, then and there, by virtue of the writ and precept aforesaid, to the enervation of the aforesaid privilege of him, the said Matthias Ashby, of and in the premises aforesaid: whereupon the said Matthias Ashby saith that he is injured, and has sustained damage to the value of 2007, and thereupon he brings suit, &c. Not guilty. Verdict for the plaintiff.

Note. — Judgment was arrested in B. R. by three judges against *Holt*. But on the 14th of January, 1703, this judgment was reversed in the House of Lords, and judgment given for the plaintiff by fifty lords against sixteen.

After a verdict for the plaintiff on not guilty pleaded, it was moved in arrest of judgment by Sergeant Whitaker that this action was not maintainable. And for the difficulty, it was ordered to stand in the paper, and was argued Trin. 1 Q. Anne by Mr. Weld and Mr. Montague for the defendants, and this term judgment was given against the plaintiff, by the opinion of Powell, Powys, and Gould, justices. Holt, Chief Justice, being of opinion for the plaintiff.

Gould, J.—I am of opinion, that judgment ought to be given in this case for the defendants, and I cannot by any means be reconciled to give my judgment for the plaintiff, for there are no footsteps to warrant such an opinion, but only a single case. I am of opinion, that this action is not maintainable for these four reasons: first, because the defendants are judges of the thing, and act herein as judges; secondly, because it is a parliamentary matter, with which we have nothing to do; thirdly, the plaintiff's privilege of voting is not a matter of property or profit, so that the hindrance of it is merely damnum sine injuria; fourthly, it relates to the public, and is a popular offence.

As to the first, the king's writ constitutes the defendant a judge in this case, and gives him power to allow or disallow the plaintiff's vote. For this reason it is, that no action lies against

a sheriff for taking insufficient bail, because he is the judge of their sufficiency. So is the case of *Medcalf* v. *Hodson*, Hutt. 120, and their sufficiency is not traversable, 1 Lev. 86, *Bentley* v. *Hore*. Upon the same reason the resolution of the court is founded in the case of *Hammond* v. *Howell*, Mod. 218, that no (a) action lies against a man for what he does as a judge. 9 Hen. fo. pl. 9.

- 2. This is a parliamentary matter, and the parliament is to judge whether the plaintiff had a right of electing or not, for it may be a dispute whether the right of election be in a select number or in the populace; and this is proper for the parliament to determine, and not for us; and if we should take upon us to determine that he has a right to vote, and the parliament be of opinion that he has none, an inconvenience would follow from contrary judgments. So in 2 Vent. 37, Onslow's Case, it is adjudged that no (b) action lies for a double return of members to serve in parliament. The resolution of the King's Bench in the case of Barnardiston v. Soame, 2 Lev. 114, was given on this particular reason, that there had been a determination before in parliament in favor of the plaintiff. And Hale said, we pursue the judgment of the parliament; but the plaintiff would have been too early, if he had come before; and yet that judgment was reversed.
- 3. It is not any matter of profit, either in præsenti or in futuro. To raise an action upon the case, both damage and injury must concur, as in the case of 19 Hen. 6, 44, cited Hob. 267. If a man forge a bond in another's name, no action upon the case lies, till the bond be put in suit against the party; so here, it may be this refusal of the plaintiff's vote may be no injury to him, according as the parliament shall decide the matter; for they may adjudge, that he had no right to vote, whereby it will appear, the plaintiff was mistaken in his opinion as to his right of election, and consequently has sustained no injury by the defendants' denying to take his vote.
- 4. It is a matter which relates to the public, and is a kind of popular offence, and therefore no action is given to the party; for by the same reason one man may bring an action, a hundred may, and so actions infinite for one default: which the law will not allow, as is agreed in *William's Case*, 5 Co. 73 a. and 104 b.

Boulton's Case. Perhaps, in this case, after the parliament have adjudged the plaintiff has a right of voting, an information may lie against the sheriff for his refusal to receive it. So the case of Ford v. Hoskins, 2 Cro. 368; 2 Brownl. 194. Such an action as this was never brought before, and therefore shall be taken not to lie, though that be not a conclusive reason. As to the case of Sterling v. Turner, 3 Lev. 50, 2 Vent. 50, where an action was brought by the plaintiff, who was candidate for the place of bridgemaster of London, for refusing him a poll, and adjudged maintainable, there is a loss of a profitable place. So the case of Herring v. Finch, 2 Lev. 250, where the plaintiff brought an action on the case against the defendant, for that the plaintiff being a freeman, who had a voice in the election of mayor, the defendant being the present mayor refused to admit his voice; in that case the defendant is guilty of a breach of his faith: and in both these cases the plaintiff has no other remedy, either in parliament or anywhere else, as the plaintiff in our case has. So that I am of opinion that judgment ought to be given for the defendant upon the merits. But upon this declaration the plaintiff cannot maintain any action, for the plaintiff does not allege in his count that the two burgesses elected were returned, and if they were never returned, there is no damage to the plaintiff. See 2 Bulstr. 265. But I do not rely upon this fault in the declaration.

Powys, J.—I am of the same opinion, that no action lies against the defendant, 1, Because the defendant as bailiff is quasi a judge, and has a distinguishing power either to receive or refuse the votes of such as come to vote, and does preside in this affair at the time of election: though this determination be not conclusive, but subject to the judgment of the parliament, where the plaintiff must take his remedy.

2. If the defendant misbehave himself in his office by making a false or double return, an action lies against him for it on the late statute 7 & 8 W. 3, c. 7, and therein all this matter of refusing the plaintiff's vote is comprised, and all the special matter is scanned in that action. And if you allow the plaintiff to maintain an action for this matter, then every elector may bring his action, and so the officer shall be loaded with a number of actions that may ruin him; and he may follow one lawsuit, though he may not be able to follow many. These actions proceed from heat, I will not call it revenge; and it is

not like splitting of actions, scilicet, of one cause of action into many, but the causes of action are several, and the court cannot unite them, but A., B., C., D., E., and a hundred more may at this rate bring actions.

3. There is a vast intricacy in determining the right of electors, and there is a variety, and a different manner and right of election in every borough almost. As in some boroughs every potwaller has a right to vote, in some residents only vote, and in others the outlying burgesses that live a hundred miles off; nay, I know Ludlow a borough, where all the burgesses' daughters' husbands have a right to vote. But now all this matter is comprised in an action against the officer for a false return. But it is objected that by the law of England every one who suffers a wrong has a remedy; and here is a privilege lost, and shall not the plaintiff have a remedy? To that I answer, first, it is not an injury, properly speaking; it is not damnum, for the plaintiff does not lose his privilege by this refusal, for when the matter comes before the committee of elections, the plaintiff's vote will be allowed as a good vote; and so in an action upon the case by one of the candidates for a false return, this tender of his vote by the plaintiff shall be allowed as much as if it had been given actually and received. And if this refusal of the plaintiff's vote be an injury, it is of so small and little consideration in the law that no action will lie for it; it is one of those things which the maxim de minimis non curat lex. In the case of Ford v. Hoskins, 2 Cro. 368. Mod. 833. 2 Bulstr. 366. 1 Roll. Rep. 125, where an action is brought against the lord of a copyhold manor, for refusing to accept one named as successor for life by the preceding tenant for life, according to the custom, there the plaintiff suffers an injury, and yet it is adjudged that no action lies. The late statute 7 & 8 W. 3, c. 7, gives an action against the officer for a misfeasance to the party aggrieved, i. e. to the candidate, who is to have his vote; so that by the judgment of the parliament he cannot have any action. Before the statute of 23 Hen. 6 no (a) action lay for the candidate, who was the party aggrieved, against the officer, for a false return, because it related to parliamentary matters, as is adjudged 3 Lev. 29, 30, Onslow v. Raply, and yet he had an injury; and till the 7 & 8 W. 3, no

- (a) action lay for the candidate against the officer for a double return, as is adjudged in the same case, 3 Lev. 29. 2 Ventr. 37, and yet he suffered an injury thereby; à fortiori no action shall lie for the plaintiff in this case.
- 4. This action is not maintainable for another reason, which I think is a weighty one, viz. this action is primæ impressionis; never the like action was brought before, and therefore as (b) Littleton, s. 108, uses it to prove that no action lay on the Statute of Merton, 20 Hen. 3, c. 6, si parentes conquerantur, for if it had lain, it would have sometimes been put in use: so here. So in the case of Lord Say and Seale v. Stephens, Cro. 142, for the law is not apt to catch at actions. It is agreed by the consent of all ages, that no (c) action lay at common law against the officer for a double return; and yet in one year, viz. 1641, there were no less than seventy double returns, and yet they made no act to help it, though the parliament could not be misconusant of the matter.
- 5. Another reason against the action is, that the determination of this matter is particularly reserved to the parliament, as a matter properly conusable by them; and to them it belongs to determine the fundamental rights of their house, and of the constituent parts of it, the members; and the courts of Westminster shall not tell them who shall sit there. Besides, we are not acquainted with the learning of elections; and there is a particular cunning in it not known to us, nor do we go by the same rules, and they often determine contrary to our opinions without doors. The late statute, which enacts that the last determination of the house as to the right of election shall be a rule to the judges in the trial of any cause, is a declaration of their power; and the paths the judges are to walk in are chalked out to them, so that they are not left to use their own judgment; but the determination of the house is to be the rule of law to us, and we are not to examine beyond that. Suppose in this action we should adjudge one way, and after in parliament it should be determined another way; or suppose a judge of nisi prius, before whom the cause comes to be tried, should say, "I am not bound by the rule of the last determination in parliament in this action, for this is another sort of action, not within the meaning of the statute:" these things would be of ill consequence.

⁽a) Ibid. (b) Vide Co. Litt. 81. b.; 13 Ed. n. 2. (c) D. cont. 1 Wils. 127.

6. Another reason against this action is, that if we should allow this action to lie for the plaintiff, à fortiori we must allow an action to be maintainable for the candidates against the defendant for the same refusal; for the candidates have both damnum et injuriam, and are the parties aggrieved; and if we should allow that, we shall multiply actions upon the officers, at the suit of the candidates, and every particular elector too; so that men will be thereby deterred from venturing to act in such offices, when the acting therein becomes so perilous to them and their families. I will not insist upon the exceptions to the declaration, but give my opinion upon the merits. think there is a sufficient allegation in the count of the return of the election, especially after a verdict. Nor shall I insist that it does not appear in the declaration how near the party was to be chosen; nor that this action is brought merely for a possibility; for this is an action for a personal injury; and the plaintiff might give his vote for which he pleased, either the candidate that had fewer or more voices; or he might give his vote for one who had no other burgess's voice but the plaintiff's own; for the plaintiff, in those cases, is deprived as much of his privilege as if the person for whom he voted was nearest to be chosen. But it has been objected that the defendant should not have absolutely refused to receive the plaintiff's vote, but should have reserved it for scrutiny, and should have admitted it de bene esse. To that I answer; he might indeed have done so; but he was not obliged to do it, for the officer is supposed to know every man's right and pretence of election, and commonly the weaker party are for bringing in new votes, and devising new contrivances; but the officer ought to disallow them at first, and not give so much countenance to such a practice as to reserve it for a scrutiny. As here in Westminster-hall, when a matter of law comes before us, if it be a clear case, we may give judgment in it on the first argument, and it will be a good judgment, although it be usual to hear several arguments. The objection of weight is the resolution between Sterling and Turner, 2 Lev. 50. Hale said that it was a good precedent: and the case of Herring and Finch, 2 Lev. 250, though as to that case it was not adjudged upon the matter of law, but went off upon a point of evidence, yet I will admit the action to lie for the plaintiff in those cases, but they do not at all relate to the parliament, but are matters of cus-

tom merely relating to the government of the city, and are properly determinable at common law. And although it may be said, that this case also relates to the government of the town, so does a public nuisance in a highway; but if a particular person receive an injury, he may have his action; but that does not relate to the parliament as this matter does; and the whole case here turns upon that, viz. its being a parliamentary matter. If we should admit this action to lie, we shall have work enough in Westminster hall brought in by a side-wind; nay, so much, that we shall even be glad to petition the parliament to take this power away from us. Besides, the judgment here cannot be called properly a determination; it will only be a litigation; for our judgment cannot be cited as an authority in parliament, nor will the parliament mind it, or be bound up by it, for they (a) themselves are not bound even by their own determination, but may determine contrary to it, though that be a rule upon the courts of Westminster. But it has been objected, that this is no determination of the election in this judgment, but only of a particular injury. To that I answer, It will be in consequence of a determination of the election; for if the plaintiff had a right to vote, then this action is maintainable; if he has no right, then he can have no action; and, by consequence, twenty others may have a right to vote, and the election may turn upon this single vote; and his right of voting is as much parliamentary as the whole election, and may as much entangle the case. It is said in Onslow's Case, 2 Vent. 37, that the courts of Westminster must not enlarge their jurisdiction in these matters, further than the statute gives them; and indeed it is a happiness to us that we are so far disengaged from the heats which attend elections. Our business is to determine of meum and tuum, where the heats do not run so high as in things belonging to the legislature; therefore, this being an unprecedented case, I shall conclude with a saying of my Lord Coke, 2 Bulst. 338. Omnis innovatio plus novitate perturbat quam utilitate prodest.

Powell, J.—I am of the same opinion, that the judgment ought to be arrested. As to the novelty of this action, I think it no argument against the action; for there have been actions on the case brought that have never been brought before, but

had their beginning of late years; and we must judge upon the same reason as other cases have been determined by. I do not agree with my brothers upon their first reason, that the defendant is a judge. I do not understand what my brother Powys means by saying he is quasi a judge: surely he must be a judge or no judge. The bailiff is not a judge, but only an officer or minister to execute the precept. But I agree with them in their other reasons to give judgment against the plaintiff; and chiefly, because in this action there does not appear such an injury or damage as is necessary to maintain an action on the case. An injury must have relation to some privilege the party has. The case of Turner v. Sterling, 2 Lev. 50, is adjudged upon a particular reason; for the defendant, by refusing him the poll, deprived him of the means of knowing whether he had a right or not. If cestui que use desires the feoffees to make a feoffment over to another, and they refuse, no action upon the case lies against them for this refusal. And in the case of Ford against Hoskins, 2 Bulstr. 337, 2 Cro. 368, it is resolved that no action lies for the nominee against the lord, for refusing to keep a court, and to admit him; (a) yet this is a hard case, for the party is thereby deprived of the means of coming to his right. But that case differs from the case of Sterling v. Turner; for the party hath a known remedy in Chancery, to compel the lord to hold a court and admit him, but the other had no remedy against the mayor but an action. Here is no injury to the plaintiff; for though he has alleged in his declaration, that he had a right to vote, and was hindered of it by the defendant, yet that does not give him a right, unless the finding thereof by the jury do confer such right; but that cannot be so, for the jury cannot judge of this right in the first

⁽a) But he may have a mandamus. Rex v. Lord of the Manor of Hendon, 2 T. R. 484; Rex v. Coggan, 6 East, 431. And so may the heir, Rex v. Masters of Brewers' Co., 3 B. & C. 172; though in Rex v. Rennett, 2 T. R. 197, it had been held otherwise. So may the surrenderee of the heir, although the heir was not admitted, upon payment of the proper fine, including the fine payable upon the descent to the heir. R. v. Dullingham, 8 A. & E. 858; 1 P. & D. 172, S. C. But where the heir's title is clearly barred by lapse of time, a mandamus will not be granted to admit him, for he may bring ejectment without. Rex v. Agardsley, 5 Dowl. 17. And in cases involving questions of equity, e.g. that of the surrenderee of a trustee appointed under 11 Geo. 4 & 1 Will. 4, c. 60, s. 8, the Court of Queen's Bench will not interfere by mandamus. Rex v. Pitt. 10 A. & E. 272. Also, inasmuch as the lord must be included in the writ, no mandamus lies to admit to a copyhold held of the crown. Rex v. Powell, 1 Q. B. 352.

instance, because it is a right properly determinable in parlia-The parliament have a peculiar right to examine the due election of their members, which is to determine whether they are elected by proper electors, such as have a right to elect; for the right of voting is the great difficulty in the determination of the due election, and belongs to the parliament to decide. But it is objected, admitting the plaintiff had a right to vote, and was deprived of it, shall he have no remedy? To that I answer, he shall have a remedy in proper time; but the plaintiff here comes too soon; he shall have a remedy by action after the parliament have determined that he had a right, but not before. This is not such a right, the deprivation whereof will make an injury, till it be determined in parliament. But the plaintiff has a proper remedy by petition to the parliament setting forth his case; and after the parliament have adjudged that he had a right of voting, he shall have an action at law to recover damages, when his right is so fixed and settled. The opinion of my lord Hobart in the case of Sir William Elvis and the Archbishop of York, Hob. 317, 318, and the reason of that opinion comes very near to the present case: that if the church be litigious, and two clerks be presented to the ordinary, and he award a jure patronatus (a) to inquire which patron has the right, and the inquest find for one, and yet the ordinary receive the clerk of the other, contrary to the finding of the jury, in that case, if the other patron bring his quare impedit against the usurper and his incumbent, not naming the bishop, and proves his title, he may afterwards have an action upon the case against the ordinary, for that wilful wrong, delay, and trouble, that he hath put him to; and he shall recover costs and damages, not in respect of the value of the church (for there are no damages for that by the common law, but by West. 2, 13 Edw. 1, st. 1, c. 5, s. 3), but for the other respects before mentioned. But if he name the ordinary in the quare impedit, he can have no other action of the case, neither shall he have such action upon the case before he hath tried his title in a proper action, and against the proper parties. So that in that case, though the patron's right, being found by the jury on the jure patronatus, is in some measure determined, yet he shall not maintain an action upon the case against the ordi-

⁽a) See the nature of this proceeding explained, 3 Bl. Comm. 246.

nary, but he must first prove his title in a proper manner by a quare impedit, and thereby prove the ordinary a disturber; and after that he may bring his action on the case, against the ordinary for his damages. Where the party has no possibility of settling his right, as in the case of Sterling and Turner, there he shall maintain his action for the disturbance before his right be settled; but where he has a proper method, as in our case, he shall not maintain an action till his right be determined; and the reason of this difference is very strong because of the inconveniences of contrary determinations upon the several actions, or of the different judgments by the House of Commons, and the judges at common law; for the house may be of opinion that the plaintiff has a right to vote, and yet the judges may be of opinion upon the action that he hath none, and give judgment against him; and even though he has a right, he will have no remedy; et e converso. But this difference of opinions will be prevented by such previous application to the house before any action brought. Besides, in this case, here is not a damage, upon which this action is maintainable; for, to maintain an action upon the case, there must be either a real damage, or a possibility of a real damage, and not merely a damage in opinion, or consequence of law. For a possibility of a damage, as an action upon the case, lies for the owner of an ancient market, for erecting a new market near his; and yet perhaps the cattle that come to the old market might not be sold, and so no toll due; and consequently no real damage, but there is a possibility of damage. But in our case there is no possibility of a damage. It is laid in the declaration, that the defendant obstructed him from giving his vote; but that is too general without showing the manner how he obstructed him, as that the defendant kept him out of the usual place where the votes are taken. The plaintiff shows no damage in his count, and the verdict will not supply it, for the plaintiff ought always allege a damage, as in an action upon the case brought against the lessee by him in the reversion, for refusing to permit him to enter to view waste, it would not be sufficient to allege thus generally, that the defendant obstructed him, &c. It is laid here, that the defendants ipsum the plaintiff ad suffragium suum dare obstruxerunt, et penitus recusaverunt : I do not know what that means in this case. Indeed, it is a sufficient description of a disseisin of a rent seek; but if the plaintiff gives his vote

for a candidate, that is as effectual as if the officer writ it down, for it is his vote by the giving of it, and the officer cannot hinder him of it, and on a poll it will be a good vote, and must be allowed, and so there is no wrong done to the plaintiff, for his vote was a good vote notwithstanding what the defendant did. Besides, the plaintiff can make no profit of his vote; and it is like the case of a quare impedit, in which the plaintiff at common law recovered no damages, because he ought not to sell the presentation, and so could make no profit of it. So here, for it would be criminal for the plaintiff to sell his vote. Perhaps the putting the plaintiff to trouble and charge, to maintain and vindicate his right of voting, might be sufficient damage to maintain an action on the case; but as our case is, I cannot see that the plaintiff has received any damage. Great inconveniences do attend the allowance of this action, as my brothers have said; as that it will occasion multiplicity of actions, and for that reason it is, that the law gives no action to a private person for a public nuisance, for there is a remedy by indictment to redress it. So here the plaintiff has a remedy in parliament. As to the case of Westbury v. Powell, Co. Lit. 50. a., where the inhabitants of Southwark had a watering-place for their cattle by custom, which was stopped up, there any inhabitant might have an action, because there was no other remedy by presentment or the like; but if it had been a nuisance presentable, no action (a) would have lain. So in the case of Sterling and Turner, the party had no other remedy. So in the case of Herring and Finch, which is a strong case; and I do not know whether an action will lie in that case, for refusing to admit his voice to the election of a mayor; but there the plaintiff has no other remedy, nor other way to settle his right. If we should adjudge that this action lies, it will be dangerous to execute any office of this nature, and will deter men from undertaking public offices, which will be a thing of ill consequence. I am of opinion upon the whole matter, that after a determination in the parliament for the plaintiff's right, the trouble and charge of vindicating it will maintain an action, but in this case no action lies, and therefore the judgment ought to be arrested. Holt (b), Chief Justice. — The single question in this case is.

self in a manuscript first published in 1837, at the request of Lord Denman, under the title of "The judgments of

⁽a) Vide L. Ray. 486.

⁽b) [Lord Holt's argument has been more fully and lucidly set forth by him-

Whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in parliament, be refused and hindered to give it by the officer, if an action on the case will lie against such officer?

I am of opinion that judgment ought to be given in this case for the plaintiff. My brothers differ from me in opinion; and they all differ from one another in the reasons of their opinion; but notwithstanding their opinion, I think the plaintiff ought to recover and that this action is well maintainable, and ought to lie. I will consider their reasons. My brother Gould thinks no action will lie against the defendant, because, as he says, he is a judge; my brother Powys indeed says, he is no judge, but quasi a judge; but my brother Powell is of opinion, that the defendant neither is a judge, nor anything like a judge, and that is true: for the defendant is only an officer to execute the precept, i. e. only to give notice to the electors of the time and place of election, and to assemble them together in order to elect, and upon the conclusion to cast up the poll, and declare which candidate has the majority.

But to proceed, I will do these two things: first, I will maintain that the plaintiff has a right and privilege to give his vote; secondly, in consequence thereof, that if he be hindered in the enjoyment or exercise of that right, the law gives him an action against the disturber, and that this is the proper action given by the law.

I did not at first think it would be any difficulty to prove that the plaintiff has a right to vote, nor necessary to maintain it, but from what my brothers have said in their arguments I find it will be necessary to prove it. It is not to be doubted, but that the Commons of *England* have a great and considerable right in the government, and a share in the legislative, without whom no law passes; but because of their vast numbers this right is not exercisable by them in their proper persons, and therefore by the constitution of *England*, it has been directed, that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the Commons of *England* vested in them: and this representation

Lord Holt in the case of Ashby v. White and John Patey and others." This manuscript contains probably a revised form of the judgment prepared for use in the House of Lords, post, 328 n.]

is exercised in three different qualities, either as knights of shires, citizens of cities, or burgesses of boroughs; and these are the persons qualified to represent all the Commons of England. The election of knights belongs to the freeholders of the counties, and it is an original right vested in and inseparable from the freehold, and can no more be severed from their freehold than the freehold itself can be taken away. Before the statute of 8 Hen. 6, c. 7, any man that had a freehold, though never so small, had a right of voting, but by that statute the right of election is confined to such persons as have lands or tenements to the yearly value of forty shillings at least, because, as the statute says, of the tumults and disorders which happened at elections, by the excessive and outrageous number of electors; but still the right of election is an original right, incident to and inseparable from the freehold. As for citizens and burgesses, they depend on the same right as the knights of shires, and differ only as to the tenure, but the right and manner of their election is on the same foundation. Now, boroughs are of two sorts: first, where the electors give their voices by reason of their burgership; or, secondly, by reason of their being members of the corporation. Littleton, in his chapter of tenure in burgage, 162 C. L. 108 b. 109, says. "Tenure in burgage is, where an ancient borough is, of the which the king is lord, of whom the tenants hold by certain rent, and it is but a tenure in socage;" and, sect. 164, he says, "and it is to wit, that the ancient towns called boroughs, be the most ancient towns that be within England, and are called boroughs, because of them come the burgesses to parliament." So that the tenure of burgage is from the antiquity, and their tenure in socage is the reason of their estate, and the right of election is annexed to their estate. So that it is part of the constitution of England, that these boroughs shall elect members to serve in parliament, whether they be boroughs corporate or not corporate; and in that case the right of election is a privilege annexed to the burgage land, and is, as I may properly call it, a real privilege. But the second sort is, where a corporation is created by charter, or by prescription, and the members of the corporation as such choose burgesses to serve in parliament. The first sort have a right of choosing burgesses as a real right, but here in this last case it is a personal right, and not a real one, and is exercised in such a manner as the charter

or custom prescribes; and the inheritance of this right, or the right of election itself, is in the whole body politic, but the exercise and enjoyment of this right is in the particular members. And when this right of election is granted within time of memory, it is a franchise that can be given only to a corporation; as is resolved by all the judges against my lord Hobart, in the case of Dungannon in Ireland, 12 Co. 120, 121, that if the king grant to the inhabitants of Islington to be a free borough, and that the burgesses of the same town may elect two burgesses to serve in parliament, that (a) such a grant of such privilege to burgesses not incorporated is void, for the inhabitants have not capacity to take an inheritance. See Hob. 15. The principal case there was, the king constituted the town of Dungannon to be a free borough, and that the inhabitants thereof shall be a body politic and corporate, consisting of one provost, twelve free burgesses and commonalty; and in the same name may sue and be sued; et quod ipsi præfatus præpositus et liberi burgenses burgi prædicti et successores sui in perpetuum habeant plenam potestatem et authoritatem eligendi, mittendi, et retornandi duos discretos et idoneos viros ad inserviendum et attendendum in quolibet parliamento, in dicto regno nostro Hiberniæ in posterum tenendo, and so proceeds to give them power to treat, and give voice in parliament, as other burgesses of any other ancient borough, either in Ireland or England, have used to do. And upon this grant it was adjudged, by all the judges of England, that this power to elect burgesses is an inheritance of which the provost and burgesses were not capable, for that it ought to be vested in the entire corporation, viz. provost, burgesses, and commonalty, and that therefore the law in this case did vest that privilege in the whole corporation in point of interest, though the execution of it was committed to some persons, members of the same corporation, 12 Co. 120, 121. Hob. 14, 15. As to the manner of election, every borough subsists on its own foundation, and where this privilege of election is used by particular persons, it is a particular right vested in every particular man; for if we consider the matter, it will appear that the particular members and electors, their persons, their estates, and their liberties are concerned in the laws that are made, and they are represented as particular persons, and not quatenus a

body politic; therefore, when their particular rights and properties are to be bound (which are much more valuable perhaps than those of the corporation) by the act of the representative, he ought to represent the private persons. And this is evident from all the writs, which were anciently issued for levying the wages of the knights and burgesses that served in parliament. As 46 Edw. 3 Ro. Parl. memb. 4 in dorso. For when wages were paid to the members, they were not assessed upon the corporation, but upon the commonalty as private persons, as the writ shows, which is indeed directed to the sheriff, or to the mayor, &c., yet the command is "quod de communitate comitatus civitatis vel burgi habere faciat militibus civibus aut burgensibus 101. pro expensis suis." But now, if the corporation were only to be represented, and not the particular members of it, then the corporation only ought to be at the charge; but it is plain that the particular members are at the charge. And this is no new thing, but agreeable to reason and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit of it to redound to the particular members, and to be enjoyed by them in their private capacity. As is the case of Waller and Hanger, Mo. 832, 833, where the king granted to the mayor and citizens of London, quod nulla prisagia sint soluta de vinis civium et liberorum hominum de London, &c. And there it was resolved, that although the grant be to the corporation, yet it should not enure to the body politic of the city, but to the particular persons of the corporation who should have the fruit and execution of the grant for their private wines, and it should not extend to the wines belonging to the body politic; and so is the constant experience at this day. So in the case of Mellor v. Spateman, 1 Saund. 343, where the corporation of Derby claim common by prescription, and though the inheritance of the common be in the body politic, yet the particular members enjoy the fruit and benefit of it, and put in their own cattle to feed on the common, and not the cattle belonging to the corporation: but that is not indeed our case. But from hence it appears that every man, that is to give his vote on the election of members to serve in parliament, has a several and a particular right in his private capacity, as a citizen or burgess. And surely it cannot be said, that this is so inconsiderable a right as to apply that maxim to it, de minimis non curat lex. A right that a man has to give his vote at the

election of a person to represent him in parliament, there to concur to the making of laws which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in divers statutes; as in the statute of 34 & 35 Hen. 8, c. 13, intituled an act for making of knights and burgesses within the county and city of Chester; where in the preamble it is said, that whereas the said county palatine of Chester, is, and hath been always hitherto exempt, excluded, and separated, out and from the king's court, by reason whereof the said inhabitants have hitherto sustained manifold disherisons, losses, and damages, as well in their lands, goods, and bodies, as in the good, civil, and politic governance and maintenance of the commonwealth of their said county, &c. So that the opinion of the parliament is that the want of this privilege occasions great loss and damage. And the same farther appears from the 25 Car. 2, c. 9, an act to enable the county palatine of Durham to send knights and burgesses to serve in parliament, which recites, "whereas the inhabitants of the county palatine of Durham have not hitherto had the liberty and privilege of electing and sending any knights and burgesses to the high court of parliament," &c. The right of voting at the election of burgesses is a thing of the highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it. These reasons have satisfied me to the first point.

2. If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; (a) for want of right and want of remedy are reciprocal. As if a purchaser of an advowson in fee-simple, before any presentment, suffer an usurpation, and six months to pass, without bringing his quare impedit, he (b) has lost his right to the advowson, because he has lost his quare impedit, which was his only remedy; for he (c) could not maintain a writ of right of advowson; and though he afterwards usurp and die, and the advowson descend to his heir; yet (d) the heir cannot be remitted, but the advowson is lost forever without recovery; 6 Co. 50. Where a man has but

⁽a) D. acc. Co. 58, b.

⁽b) Sed nunc, vide 7 Ann, c. 18.

⁽c) Vide H. Bl. 1 Lit. S. 514. Co. Lit. 293. a.

⁽d) Vide 6 Co. 58.

one remedy to come at his right, if he loses that he loses his right. It would look very strange, when the Commons of England are so fond of their right of sending representatives to parliament, that it should be in the power of a sheriff or other officer to deprive them of that right, and yet that they should have no remedy; it is a thing to be admired at by all mankind. Supposing then that the plaintiff had a right of voting, and so it appears on the record, and the defendant has excluded him from it, nobody can say that the defendant has done well: then he must have done ill, for he has deprived the plaintiff of his right; so that the plaintiff, having a right to vote, and the defendant having hindered him of it, it is an injury to the plaintiff. Where a new act of parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him. How else comes an action to be maintainable by the party on the statute of 2 Ric. 2, de scandalis magnatum, 12 Co. 134, but in consequence of law? For the statute was made for the preservation of the public peace, and that no writ of error lies in the Exchequer Chamber by force of the Statute of 27 Eliz. in a judgment in the King's Bench on an action de scandalis, for it is not included within the words of the statute: for though the statute says, such writ shall lie upon judgments in actions on the case, vet it does not extend to that action, although it be an action on the case, because (a) it is an action of a far higher degree, being founded specially upon a statute, 1 Cro. 142. If, then, when a statute gives a right, the party shall have an action for the infringement of it, is it not as forcible when a man has his right by the common law? This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it. But there wants not a statute too in this case, for by West. 1. 3 Edw. 1, c. 5, it is enacted, "that forasmuch as elections ought to be free, the king forbids, upon grievous forfeiture, that any great man, or other, by power of arms, or by malice, or menaces, shall disturb to make free election." 2 Inst. 168, 169. And this statute, as my lord Coke observes, is only an enforcement of the common law; and if the parliament thought the freedom of elections to be a

matter of that consequence, as to give their sanction to it, and to enact that they should be free; it is a violation of that statute to disturb the plaintiff, in this case, in giving his vote at an election, and consequently actionable.

And I am of opinion, that this action on the case is a proper action. My brother Powell indeed thinks that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another, for riding over his ground, though it do him no damage: for it is an invasion of his property, and the other has no right to come there; and in these cases the action is brought vi et armis. But for invasion of another's franchise trespass vi et armis does not lie, but an action of trespass on the case; as where a man has retorna brevium, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it. So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And, it is no objection to say, that it will occasion multiplicity of actions: for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action. So, if many persons receive a private injury by a public nuisance, every man shall have his action, as is agreed in Williams' Case, 5 Co. 73. a; and Westbury and Powell, Co. Lit. 56. a. Indeed, where many men are offended by one particular act, there they must proceed by way of indictment, and not of action; for in that case the law will not multiply actions. But it is otherwise when one man only is offended by that act, he shall have his action; as if a man dig a pit in a common, every commoner shall have an action on the case per quod communiam suam in tam amplo modo habere non potuit; for every commoner

has a several right. But it would be otherwise if a man dig a pit in a highway; every passenger shall not bring his action, but the (a) party shall be punished by indictment, because the injury is general and common to all that pass. But when the injury is particular and peculiar to every man, each man shall have his action. In the case of Turner v. Sterling, the plaintiff was not elected; he could not give, in evidence, the loss of his place as a damage, for he was never in it; but the gist of the action is that the plaintiff having a right to stand for the place, and it being difficult to determine who had the majority, he had therefore a right to demand a poll, and the defendant, by denying it, was liable to an action. If public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences. So the case of Hunt and Dowman, 2 Cro. 478, where an action on the case is brought by him in reversion against lessee for years, for refusing to let him enter into the house to see whether any waste was committed. In that case the action is not founded on the damage, for it did not appear that any waste was done, but because the plaintiff was hindered in the enjoyment of his right, and surely no other reason for the action can be supposed.

But in the principal case, my brother says we cannot judge of this matter, because it is a parliamentary thing. O! by all means, be very tender of that. Besides, it is intricate, that there may be contrariety of opinions. But this matter can never come in question in parliament, for it is agreed that the persons for whom the plaintiff voted were elected, so that the action is brought for being deprived of his vote; and if it were carried for the other candidates against whom he voted, his damage would be less. To allow this action will make public officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation. But they say that this is a matter out of our jurisdiction, and we ought not to enlarge it. I agree we ought not to encroach or enlarge our jurisdiction; by so doing we usurp both on the right of the queen and the people: but sure we may determine on a charter

granted by the king, or on a matter of custom or prescription, when it comes before us, without encroaching on the parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him remedy? The parliament undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates.

My brother Powell says, that the plaintiff's right of voting ought first to have been determined in parliament, and to that purpose cites the opinion of my Lord Hobart, 318, that the patron may bring his action upon the case against the ordinary after a judgment for him in a quare impedit, but not before. It is indeed a fine opinion, but I do not know whether it will bear debating, and how it will prove when it comes to be handled. For at common law the patron had no remedy for damages against the disturber, but the statute 13 Ed. 1, st. 1, c. 5, s. 3, gives him damages; but if he will not make the bishop a party to the suit, he has lost his remedy which the statute gives him. But in our case the plaintiff has no opportunity to have remedy elsewhere. My brother Powys has cited the opinion of Littleton on the statute of Merton that no action lay upon the words "si parentes conquerantur," because none had ever been brought, yet he cannot depend upon it. Indeed, that is an argument, when it is founded upon reason, but it is none when it is against reason. But I will consider the opinion. Some question has arisen on the opening of that statute on those words, "si parentes conquerantur," &c., what was the meaning of them, whether they meant a complaint in a court in a judicial manner (a). But it (b) is plain the word "conquerantur" means only "si parentes lamententur," that is, only a complaint in pais, and not in a court; for the guardian in

⁽a) That usage may explain the meaning of an ancient statute, see Rex v. Scot, 3 T. R. 604; Sheppard v. Gosnald, Vaugh. 169. Dunbar v. Roxburgh, 3 Cl. & Fin. 335. [The Montrose Peerage case, 1 Macqueen, H. of L. 401.] In Bank of England v. Anderson, 3 Bing, N. C. 666, per

Tindal, C. J.—"We attribute great weight to that maxim of law, contemporance expositio for tissima est in lege." And this is said with reference to a statute no older than 5 & 6 W. & M. [See Broom's Legal Maxims, 6th ed. 638, et seq.]

⁽b) Vide Litt. 108.

socage shall enter in that case, and shall have a special writ de ejectione custodiæ terræ et hæredis. But this saying has no! great force; if it had, it would have been destructive of many new actions, which are at this day held to be good law. The case of Hunt and Dowman, before mentioned, was the first action of that nature; but it was grounded on the common reason and the ancient justice of the law. So the case of Turner and Sterling. Let us consider wherein the law consists. and we shall find it to be, not in particular instances and precedents, but in the reason of the law, and ubi eadem ratio, idem jus. This privilege of voting does not differ from any other franchise whatsoever. If the House of Commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections; but we must not be frighted when a matter of property comes before us by saying it belongs to the parliament; we must exert the queen's jurisdiction. My opinion is founded on the law of England. The case of Mors and Slue, 1 Vent. 190, 238, was the first action of that nature; but the novelty of it was no objection to it. So the case of Smith and Grashaw, 1 Cro. 15, W. Jones, 93, that an action of the case lay for falsely and maliciously indicting the plaintiff for treason though the objections were strong against it, yet it was adjudged, that if the prosecution were without probable cause, there was as much reason the action should be maintained as in other cases. So 15 Car. 2 C. B., between Bodily and Long, it was adjudged by Bridgman, Chief Justice, &c., that an action on the case lay for a riding whenever the plaintiff and his wife fought, for it was a scandalous and reproachful thing. So in the case of Herring and Finch, 2 Lev. 250, nobody scrupled but that the action well lay, for the plaintiff was thereby deprived of his right. And if an action is maintainable against an officer for hindering the plaintiff from voting for a mayor of a corporation, who cannot bind him in his liberty nor estate, to say that yet this action will not lie in our case, for hindering the plaintiff to vote at an election of his representative in parliament, is inconsistent. Therefore, my opinion is, that the plaintiff ought to have judgment.

Friday, the 14th of January, 1703, this (a) judgment was

reversed in the House of Lords, and judgment given for the plaintiff by fifty lords against sixteen. Trevor, Chief Justice, and Baron Price were of opinion with the three judges of the King's Bench. Ward, C.B., and Bury and Smith, barons, were of opinion with the Lord Chief Justice Holt, Tracy dubitante, Neville and Blencowe absent.

(Note. — I had it from good hands, that Tracy agreed clearly that the action lay, but was doubtful upon the manner of laying the declaration.)

Upon the arguments of this case, Holt, Chief Justice, said. the plaintiff has a particular right vested in him to vote. Is it not then a wrong, and an injury to that right, to refuse to receive his vote? So if a borough has a right of common, and the freemen are hindered from enjoying it by enclosure and the like, every freeman may maintain his action. This action is brought by the plaintiff, for the infringement of his franchise. You would have nothing to be a damage but what is pecuniary, and a damage to property. If a man has retorna brevium, although no fees were due to him at common law, yet if the sheriff enters within his liberty, and executes process there, it is an invasion of his franchise, and he may bring his action; and there is the same reason in this case. Although this matter relates to the parliament, yet it is an injury precedaneous to the parliament, as my Lord Hale said in the case of Barnardiston v. Soame, 2 Lev. 114, 116. The parliament cannot judge of this injury, nor give damage to the plaintiff for it: they cannot make him a recompense. Let all people come in, and vote fairly: it is to support one or the other party to deny any man's vote. By my consent, if such an action comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his English right: and if this action be not allowed, a man may be forever deprived of it. It is a great privilege to choose such persons as are to bind a man's life and property by the laws they make.

Ashby v. White is usually cited to exemplify the maxim of the law, ubi jus ibi remedium; a remedy which has at all times been considered so valuable, that it gave occasion to the first invention of that form of action called an action on the case. For the statute of Westminster 2, 13 Edw. 1, c. 24, which was only in affirmance of the common law on this subject, and was passed to quicken the

diligence of the clerks in the chancery, who were too much attached to ancient precedents, enacted, that "whensoever from thenceforth a writ shall be found in the chancery, and in a like case falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one; and, if they cannot agree, it shall be adjourned till the next parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors." Accordingly the courts have always held that the novelty of the particular complaint alleged in an action on the case is no objection, provided an injury cognizable by law be shown to have been inflicted on the plaintiff. Thus, in Chapman v. Pickersgill, 2 Wilson 146, which was an action for falsely and maliciously suing out a commission of bankruptey, Pratt, C. J., in answer to the objection that the action was of a novel description, said that "this had been urged in Ashby v. White, but he did not wish ever to hear it again. 'This was an action for a tort; torts were infinitely various, for there was not anything in nature that might not be converted into an instrument of mischief." So in Pasley v. Freeman, 3 T. R. 63, per Ashurst, J.: "Another argument which has been made use of is that this is a new case, and that there is no precedent of such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago. If it were not so, we ought to blot out of our law books one fourth part of the cases that are to be found in them." In Winsmore v. Greenbank, Willes, 577, the declaration stated that the plaintiff's wife unlawfully, and against his consent, went away and absented herself from him, and that during her absence a large estate was devised to her separate use; that she thereupon became desirous of being reconciled and cohabiting with her husband, but that the defendant persuaded and enticed her to continue apart till her death, which she did; whereby the plaintiff lost the comfort and society of his wife, and her assistance in his domestic affairs, and the profits and advantage of her fortune. On motion in arrest of judgment it was objected that the action was unprecedented; but Willes, C. J., said "that the form of action on the case was introduced for this reason, that the law would never suffer an injury and a damage without a remedy, and that there must be new facts in every special action on the case." Numerous other instances might here be cited, but this in so clear a matter seems unnecessary. See the judgment in Langridge v. Levy, 2 M. & W. 519.

The class of cases from which it is important to distinguish Ashby v. White, &c., are those in which a damage is incurred by the plaintiff, but a damage not occasioned by anything which the law esteems an injury. In such cases as these he is said to suffer damnum sine injuriâ, and can maintain no action. Thus, in the case of Pryce v. Belcher, reported on demurrer, 3 C. B. 58, and afterwards on a motion to enter a verdict for the plaintiff, 4 C. B. 866, which presents some features of resemblance to Ashby v. White, it appeared that Mr. Pryce, who was registered as a voter for the borough of Abingdon, but who, in consequence of non-residence, had by the effect of 6 & 7 Vict. c. 18, s. 79, in fact lost the right to vote, had notwithstanding tendered his vote at an election for the borough; whereupon Mr. Belcher, the returning officer, exceeding the limits of his duty, which, by 6 & 7 Vict. c. 18 [s. 81], was confined to putting the questions as to the identity of the voter, and whether he had voted before at

the election, wilfully, but not maliciously, instituted an inquiry into Mr. Pryce's right to vote, and upon his appearing not to be duly qualified in point of residence, refused to receive the vote except as tendered, and did not include or reckon it amongst the votes given for the candidate for whom Mr. Pryce desired to vote. An action upon the case was thereupon brought by Mr. Pryce, in which he declared in one count for the refusal to permit him to vote, in another for the omission of his vote in the account of the poll, and in a third for the unauthorized scrutiny and decision upon his right to vote whereby, as he alleged, he was delayed and hindered in the exercise of his right; all which counts were holden to present good primâ facie causes of action, 3 C. B. 58. But it was finally decided that the plaintiff could not maintain his action, on the ground stated in the judgment, "that although a party in the situation of the plaintiff has the power to compel the returning officer, under the apprehension of a prosecution, to put his name upon the poll, he has not the right to do so; that in doing so he is acting in direct contravention of the act of parliament, the terms of which are express 'that he shall not be entitled to vote:' and that the rejection of his vote cannot amount to a violation of anything which the law can consider as his right. The foundation of the plaintiff's action is the injury to his right; but we are of opinion, for the reasons above given, that he has no right, and, consequently, that he has suffered no injury." [4 C. B. 866.]

More striking instances of damnum absque injuria occur in legal proceedings, instituted for the bona fide purpose of asserting some supposed right, or prosecuting a criminal charge, which however in the event proves groundless. In such cases, in order, it should seem, to facilitate the administration of justice, it is established that unless there be both malice and an absence of reasonable and probable cause, the person against whom the proceedings are taken has no legal ground of action. See the note (c) to Skinner v. Gunton, 1 Wms. Saund. 230 a; and for modern instances see [Ram Coomar Coondoo v. Chunder Canto Mookerjee, 2 App. Cas. 186]; Gibbs v. Pike, 9 M. & W. 331, where one who, without malice, had registered under 1 & 2 Vict. c. 110, an order which, as he contended, had the effect of a judgment, was holden justified, without regard to whether it had that effect, or was properly registered or not; Davies v. Jenkins, 11 M. & W. 745, where an attorney, by mistake, sued to judgment and execution a person of the same name as the intended defendant; De Medina v. Grove, 10 Q. B. 152, affirmed [Ib. 172], where a judgment debtor was taken in execution for more than was due on the judgment and malice and want of reasonable and probable cause was not proved (seens where the amount is agreed, Wentworth v. Bullen, 9 B. & C. 840) | Phillips v. Naylor, 3 H. & N. 565, where a person entitled to protection under the Bankruptcy Acts was arrested for nonpayment of rates]; Churchill v. Siggers, 3 E. & B. 929 [Jennings v. Florence, 2 C. B. N. S. 467], where there was malice and want of probable cause, with damage; Roret v. Lewis [5 D. & L. 371], where a person privileged from arrest was nevertheless arrested through malice, but not without reasonable or probable cause [Gilding v. Eyre, 10 C. B. N. S. 592, 31 L. J. C. P. 175, where the party arrested had not obtained an order for his discharge.

And though there be malice and want of reasonable and probable cause there must also be what the law accounts damage. This, according to Lord Holt, in Savile v. Roberts, 1 Ld. Raym. 374, may be of three kinds: damage to a man's fame; damage to the person; damages to property. And such is still the law. for, "The broad canon is still true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a

subsequent action for malicious prosecution," per Bowen, L. J., Quartz Hill, &c., Co. v. Eyre, 11 Q. B. D., at p. 690; Cotterell v. Jones, 11 C. B. 713, 21 L. J. C. P. 2.

An unreversed judgment raises a necessary presumption that the proceedings to obtain it were instituted with reasonable and probable cause, Barber v. Lessiter, 7 C. B. N. S. 175; Castrique v. Behrens, 30 L. J. Q. B. 163 (and see Met. Bank v. Pooley, 10 App. Cas. 210, 54 L. J. Q. B. 449); even though the conviction be summary under a statute which gives no appeal, Basebe v. Matthews, L. R. 2 C. P. 684, 36 L. J. M. C. 93; therefore in an action for a malicious prosecution the declaration must show that the proceedings terminated in favor of the plaintiff; and for the same reason an action will not lie for a conspiracy to make it appear that the plaintiff was guilty of an offence, if he was subsequently convicted of the offence, and the conviction continues in force, Barber v. Lessiter, supra. So where the debtor against whom a writ had been issued had without appearing paid part of the claim, and judgment was nevertheless signed against him for the whole amount, it was held that until the judgment was set aside he could not maintain an action, Huffer v. Allen, L. R. 2 Exch. 15, 36 L. J. Exch. 17. And though it has been set aside, bad faith must still be shown, Smith v. Sidney, 39 L. J. Q. B. 144. So where the judgment was set aside not on the ground of irregularity, but as a matter of favor, Smith v. Sidney, L. R. 5 Q. B. 203, 39 L. J. Q. B. 144. But the success of ex parte proceedings, wherein the person proceeded against is not entitled to be heard in his own defence, for instance, to obtain sureties for the peace, does not show that there was reasonable and probable cause for taking these proceedings, Steward v. Grommet, 7 C. B. N. S. 191. As to how far the question of reasonable and probable cause is for the judge, and how far for the jury, see Douglas v. Corbett, 6 E. & B. 511; Hailes v. Maks, 7 H. & N. 56, 30 L. J. Exch. 389; Lister v. Perryman, 39 L. J. Exch. 177, L. R. 4 H. L. 521.

The burden of proving the facts from which a want of reasonable and probable cause may be inferred by the judge is upon the plaintiff, *Abrath* v. N. E. Rail. Co., 11 Q. B. D. 440, 52 L. J. Q. B. 620 (affirmed 11 App. Cas. 247), where the law on this subject is elaborately discussed in the C. A. It would seem that on the question of malice the jury are not bound by the finding of the judge as to reasonable and probable cause, nor is the want of reasonable and probable cause conclusive evidence of the malus animus, which must be inferred from all the facts, *Hicks* v. Faulkner, 8 Q. B. D., at p. 174; and see per Brett, M. R., Quartz Hill, &c., Co. v. Eyre, 11 Q. B. D., at p. 687.

In Johnson v. Emerson, L. R. 6 Exch. 329, 40 L. J. C. P. 201, which was an action for maliciously and without reasonable and probable cause procuring the plaintiff to be adjudicated a bankrupt, it appeared that the plaintiff had been adjudicated a bankrupt, and the liquidation confirmed on appeal by the Chief Judge, but afterwards set aside by the Lord Justice. The court was equally divided in opinion as to whether, under the circumstances of the case, the Martin, B., doubting whether, under the existing action was maintainable. bankruptcy law, any action can be maintained for procuring an adjudication in bankruptcy, and Bramwell, B., laying it down that no action is maintainable where the want of reasonable and probable cause is only error in law. Kelly, C. B., and Cleasby, B., who held that the action was maintainable, were of opinion that the fact that the court had made the adjudication was only evidence that the defendant might have had reasonable and probable cause for believing that an act of bankruptcy had been committed, an inference which was negatived by other evidence. The opinion of the two last-named judges was approved in the C. A. in Quartz Hill, &c., Co. v. Eyre, 11 Q. B. D. 674, in which case it was

held that an action lay for a trading company against a person who had falsely and maliciously, and without reasonable and probable cause, presented a petition under the Companies Acts to wind: it up.]

The immunity of certain privileged or confidential statements defamatory of third persons, on the ground that they are made bonû fide in the assertion of a right, or the performance of a duty [Whitely v. Adams, 15 C. B. N. S. 392, 33 L. J. C. P. 89; Cowles v. Potts, 34 L. J. Q. B. 247; Dawkins v. Paulet, L. R. 5 Q. B. 94, 39 L. J. Q. B. 53; Dawkins v. Rokeby, L. R. 8 Q. B. 255, 42 L. J. Q. B. 63; Laughton v. Bishop of Sodor and Man, L. R. 4 P. C. 495, 42 L. J. P. C. 11; Grant v. Sec. of State for India, 2 C. P. D. 445; Waller v. Loch, 7 Q. B. D. 619], or that they are fair criticism on matter of public interest [Campbell v. Spottiswood, 32 L. J. Q. B. 185; Wason v. Walter, L. R. 4 Q. B. 73, 36 L. J. Q. B. 34], furnishes another head of damnum absque injuriâ. In such cases, generally speaking, however harsh, hasty, or untrue may be the language employed, so long as it is honestly believed by the speaker or writer to be true, it does not furnish a legal ground of action. See Todd v. Hawkins, 8 C. & P. 88, per Alderson, B. [Huntley v. Ward, 6 C. B. N. S. 514, per Willes, J., and the definition of privileged communications given in Harrison v. Bush, 5 E. & B. 348; and provided he believes them to be true, it does not matter that he had no reasonable grounds for his belief, Clark v. Molyneux, 3 Q. B. D., C. A. 237, 47 L. J. Q. B. 163. Nor, it would seem, if the occasion be privileged is it essential that the writer or speaker should believe the statement to be true provided he make it without malice in fact, for it may be his duty to communicate statements which he himself does not believe, Id., per Bramwell, L. J. As to the transmission by telegram of a privileged communication, see Williamson v. Freer, L. R. 9 C. P. 393, 43 L. J. C. P. 161]. The extent and application of this doctrine have given rise to much discussion and difference of opinion. See Coxhead v. Richards, 2 C. B. 569; Somerville v. Hawkins, 10 C. B. 583; Taylor v. Hawkins, 16 Q. B. 308; Harris v. Thompson, 13 C. B. 333 [Lawless v. Anglo-Egyptian Cotton Co., L. R. 4 Q. B. 262, 38 L. J. Q. B. 129; Spill v. Maule, L. R. 4 Exch. 232, 38 L. J. Exch. 138; and Davies v. Snead, L. R. 5 Q. B. 608, 39 L. J. Q. B. 202, where a statement to one of two persons of a charge affecting both and privileged as to the person to whom it was made was held privileged also as to the other. In Tompson v. Dashwood, 11 Q. B. D. 43, 52 L. J. Q. B. 425, a letter containing defamatory statements written by the defendant under circumstances of privilege to the person for whom the letter was intended was, through negligence, sent to the wrong person. It was held not to be actionable without proof of express malice.

As to reports of proceedings in public courts, see Lewis v. Levy, E. B. & E. 537; Brook v. Evans, 6 Jur. N. S. 1025, 29 L. J. Ch. 669; Popham v. Pickburn, 7 H. & N. 891; Kain v. Mulvains, 2 Ir. R. C. L. 402; Usill v. Hales, 3 C. P. D. 319, 47 L. J. C. P. 380; Stevens v. Sampson, 5 Ex. D. 53, where a true report of proceedings upon a plaint in a county court sent in maliciously by a person not on the regular staff of a newspaper was held to be actionable. Quare whether such a report, even if sent in by a regular member of the staff, would be absolutely privileged, see the judgment of Bramwell, L. J., id. Of proceedings in Parliament and fair comments thereon, Wason v. Walter, L. R. 4 Q. B. 73, 36 L. J. Q. B. 34. In Purcell v. Sowler, 2 C. P. D., C. A. 215, 46 L. J. C. P. 208, it was held that a report of proceedings of poor-law guardians containing exparts charges against a medical officer was not privileged. Nor are report made to the editor of a newspaper and published by him, of statements charging specific acts of misconduct against a public man, Davis v. Shepstone, 11 App. Cas. 187,

By 44 & 45 Vict. c. 60, s. 2, it is enacted that "any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate and published without malice, and if the publication of the matter complained of was for the public benefit; provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor."

Words pertinent to the matter in issue, and spoken by counsel, or by an attorney acting as advocate, in the course of a judicial proceeding, are privileged, Mackay v. Ford, 5 H. & N. 792; Kain v. Mulvains, 2 Ir. R. C. L. 402; and so they are if spoken with reference to and in the course of a judicial inquiry, although irrelevant and malicious, Munster v. Lamb, 11 Q. B. D. 588, 52 L. J. Q. B. 726, overruling the opinion of Lord Denman, C. J., in Kendillon v. Maltby, Car. & M. 402. So are words spoken with reasonable and probable cause by a judge addressing a jury, Thomas v. Churton, 2 B. & S. 475, 31 L. J. Q. B. 139; and words spoken by a county court judge in his judicial capacity, though maliciously and without probable cause, Scott v. Stansfield, 3 L. R. Exch. 220, 37 L. J. Exch. 220, 37 L. J. Exch. 155. An action will not lie against a witness merely for defamation, or for perjury either in giving his evidence, or in an affidavit in a cause, Revis v. Smith, 18 C. B. 126; Henderson v. Broomhead, Cam. Seac. 4 H. & N. 569; though such perjury may go to make up a liability, as in Fitzjohn v. Mackinder, Cam. Scac. 9 C. B. N. S. 505, 30 L. J. C. P. 257, where in a county court the defendant's perjury and forgery, and the unsatisfactory manner of the plaintiff, induced the judge to commit the latter for perjury, and to bind over the defendant to prosecute; and an indictment having accordingly been preferred by the defendant, he was, on the plaintiff's acquittal, held liable to an action by the latter for a malicious prosecution. For another instance of the like kind, see Farley v. Danks, 4 E. & B. 493, where the defendant was held liable for having falsely, &c., caused the plaintiff to be adjudged a bankrupt, by false depositions which, even if true, would not have supported the adjudication, and see Johnson v. Emerson, supra. In Seaman v. Netherclift, 1 C. P. D. 540, 2 C. P. D. 53, 46 L. J. C. P. 128, which was an action of slander for words spoken by a witness, the jury had found that the words had been spoken by him maliciously, and as a volunteer for his own purposes. The divisional court held that inasmuch as the words were spoken by the witness in the course of giving his evidence, and as part of his evidence, no question should have been left to the jury, and that the action would not lie. The privilege extends to witnesses giving evidence before a committee of the House of Commons, Goffin v. Donelly, 6 Q. B. D. 307, 50 L. J. Q. B. 303. A letter addressed to the Privy Council complaining of the character of a public officer removable by them is actionable if express malice be proved, Proctor v. Webster, 16 Q. B. D. 112, 55 L. J. Q. B. 150.]

Acts done by way of self-defence against a common enemy, such as the erection of banks to prevent the inroads of the sea, fall within the same rule [as instances of damnum absque injuriâ], and damage resulting therefrom is not actionable, Rex v. Pagham, 8 B. & C. 355, 2 Man. & R. 468; per curiam, Scott v. Shepherd, 2 Blackstone, 892, set forth post. [Nield v. L. & N. W. Rail. Co., L. R. 10 Ex. 4, 44 L. J. Ex. 15, and conversely there is no common-law duty on a frontager to prevent the sea-water from getting over his wall on to his neighbor's land, and he is not liable to his neighbor for neglect to top his wall.

whereby his neighbor's land has been flooded, *Hudson* v. *Tabor*, 2 Q. B. D. 290, 46 L. J. Q. B. 463. *Semble* that it is otherwise where he has interfered with the level of his own frontage, and thereby allowed the water to get through on to his neighbor's land, *Nitro-Phosphate Co.* v. *London and St. Katherine's Dock Co.*, 9 Ch. D. 503. In that case there was a statutory duty to maintain the wall at a certain height, but the Court of Appeal appear to rest their judgment on the common-law obligation also, an obligation which Romilly, M. R., seems to have regarded as existing in *Morland v. Cooke*, L. R. 5 Eq. 252, see at pp. 262 and 267 of L. R. As to the right of the crown by virtue of its prerogative to restrain a private owner from removing shingle, forming a natural defence against the sea, see A. G. v. Tomline, 12 Ch. D. 214, 14 Ch. D. 58, C. A.]

Instances might be multiplied in which wrongs the most grievous are without legal redress. The seduction of a daughter not in her father's service, actual or constructive, Blaymire v. Haley, 6 M. & W. 55; Davies v. Williams, 10 Q. B. 725 [Manley v. Field, 7 C. B. N. S. 96; Thompson v. Ross, 5 H. & N. 16, 29 L. J. Exch. 1; Rist v. Faux, Cam. Scac. 4 B. & S. 409, 32 L. J. Q. B. 386]; even though the father be thereby forced to maintain her, Grinnell v. Wells, 8 Scott, N. R. 741, 7 M. & G. 1033, S. C.; the seduction of a daughter in her father's service, unless an actual loss of service accrue, Eager v. Grimwood, 1 Exch. 61 [Hedges v. Tagg, L. R. 7 Ex. 283, 41 L. J. Exch. 169] (quod mirum), are damna absque injuriâ. [But where a loss of service has accrued from the act of the defendant, a right to the daughter's service at the time of the seduction, though none be actually rendered, is sufficient to enable the father to maintain an action, Terry v. Hutchinson, L. R. 3 Q. B. 599, 37 L. J. Q. B. 257.]

So, before the modern act of parliament, 9 & 10 Vict. c. 93, "for compensating the families of persons killed by accidents," no action at law was maintainable against a person who, by his wrongful act, neglect, or default, might have caused the death of another, though under circumstances which would have given the sufferer a right of action had he survived; and the husband, wife, parent, or children of the deceased were without remedy against the wrongdoer, by whom they had been deprived of comfort and support. [And such is still the law in cases not provided for by the statute; see Osborn v. Gillett, L. R. S Ex. 88, where, to an action brought by a master for injury done to his servant by the negligent driving of the defendant's servant, a plea that the plaintiff's servant was killed on the spot was held, - dissentiente Bramwell, B., a good answer.] And that statute itself only gives compensation for the pecuniary [damage] sustained, Blake v. Midland Rail. Co., 18 Q. B. 93; Chapman v. Rothwell, E. B. & E. 168, 27 L. J. Q. B. 315; Duckworth v. Johnson, 4 H. & N. 653, 29 L. J. Exch. 25, including the loss of such pecuniary advantage as might reasonably have been expected to be derived from the person killed, if he had continued alive, Pym v. The Great Northern Rail. Co., Cam. Scac. 4 B. & S. 396, 32 L. J. Q. B. 377 [Franklin v. South-Eastern Rail, Co., 3 H. & N. 21; but not funeral expenses (unless, perhaps, where there was a legal duty on the plaintiff to bury, per Bramwell, B., Osborn v. Gillett, L. R. 8 Ex. 88) or mourning, Dalton v. The South-Eastern Rail. Co., 4 C. B. N. S. 296. Where, however, death has resulted from the breach of the contract to carry safely, and damage to the personal estate has been caused thereby, the executors may maintain an action, Bradshaw v. L. & Y. Rail. Co., L. R. 10 C. P. 189; but see Leggatt v. Great Northern Rail. Co., 1 Q. B. D. 599, 45 L. J. Q. B. 557, where that decision was questioned].

The case of the school set up near another school, reported H. 11 H. 4, fo. 47, pl. 21, is one of the earliest on the subject of damage, without legal cause of action, and possesses much interest. [For a modern application of the same

principle, see Hopkins v. Great Northern Rail. Co., 2 Q. B. D. 224, 46 L. J. Q. B. 265, the case of the owner of a ferry damaged by the opening of a bridge.] Others are referred to Comyn's Digest, titles, Action upon the case (B), and Action upon the case for a nuisance (C), in which serious damages, even actual nuisances, have been holden not actionable, as being either not temporal injuries, or only such as must be expected to result from the reasonable exercise of legal rights. Thus, if a man establish an offensive trade near my dwellinghouse, so as to render it uncomfortable, I may maintain an action on the case against him for a nuisance, for here is damnum coupled with injuria seven though the trade be a benefit to the public, Bamford v. Turnley, Cam. Scac. 3 B. & S. 66, 31 L. J. Q. B. 286; overruling Hole v. Barlow, 27 L. J. C. P. 207 (but see per Willes, J., Wanstead Local Board of Health v. Hill, 13 C. B. N. S. 479); 32 L. J. M. C. 135; Stockport Waterworks Co. v. Potter, 7 H. & N. 160, 31 L. J. Exch. 9; Tipping v. St. Helen's Smelting Co., 4 B. & S. 608, 11 H. L. 162. Mere personal discomfort is not, however, always sufficient to found an action, but injury to an individual's property is, per Westbury, C., ibid. For some valuable remarks as to the evidence necessary to establish a nuisance, see Salvin v. Brancepeth Coal Co., L. R. 9 Ch. 705; Benjamin v. Storr, L. R. 9 C. P. 400, 43 L. J. C. P. 162]. But if I build my house near his premises, at all events if they have been so used for twenty years, the case is altered; and, although I have damnum, yet I shall maintain no action, since it is not coupled with what the law considers injuria. Such, too, it was once thought might be the law, even if the newcomer had built within the twenty years, since otherwise a man, setting up an offensive trade even in the remotest spot, might be ruined by the first person who chose to come and dwell near him within twenty years. In Bliss v. Hall, 4 Bing, N. C. 183, some expressions, however, dropped from the court, from which it may be thought that their lordships' opinion was that nothing but a twenty years' user will entitle a man to carry on an offensive trade without interruption. The point was not, however, necessary for the decision of that case, or that of Elliotson v. Feetham [2 Bing. N. C. 134], on the authority of which it was decided. In those cases to an action for a nuisance to plaintiff's dwelling-house, a plea that the noisome trade was established before the plaintiff became possessed of the dwelling-house was held bad. Non constat however, what would have been the decision had the plea alleged that the defendant carried on the trade there before the building of the plaintiff's house. See Flight v. Thomas, 10 A. & E. 590. [It seems clear, however, that the date of the building of the plaintiff's house could only be material as tending to show at what point of time it became possible for an occupier to be inconvenienced by the nuisance, so as to put him in a position either to complain or to acquiesce, and that no right could be acquired against him, except from the implication of acquiescence during the period necessary to establish a prescription either at Common Law or under the Prescription Act. See Sturges v. Bridgman, 11 Ch. D. 852, 48 L. J. Ch. 875.

It is pointed out in the judgment of the C. A. in that case that the hardship which might result from a rigid application of the above principle, whereby it would be possible for a newcomer erecting a dwelling-house in a neighborhood devoted to trades of a noisy or unsavory character to stop them altogether, is modified by the fact that the question, whether a particular trade gives rise to an actionable nuisance, must be decided by reference to the circumstances of the locality where it is carried on, and that what might be a nuisance in Belgrave Square might not be considered to be one in Bermondsey.]

On the same principle, -viz, that damage, to sustain an action, must be coupled with injury — if A. build a house on the edge of his land, and the pro-

prietor of the adjoining land, after twenty years, dig so near it that it fall down, an action on the case lies, because the plaintiff has, by twenty years' use, acquired [by prescription] a right to the support, and to infringe that right was an injury, Stansell v. Jollard, Selw. N. P. 444. See Harris v. Ryding, 5 M. & W. 60; Hide v. Thornborough, 2 Car. & K. 250 [Brown v. Robins, 4 H. & N. 186; Bonomi v. Backhouse, E. B. & E. 622, 646, affirmed in Dom. Proc. 34 L. J. Q. B. 181; and Rowbotham v. Wilson, 8 Ho. of Lords Cases, 347, 30 L. J. Q. B. 49. And if, after its erection, the house be applied to a purpose other than that for which it was built, so that in its altered character it requires a larger degree of lateral support, a right to such support may be acquired for it by twenty years' enjoyment of it in its changed condition, provided the alteration be made without concealment, Dalton v. Angus, 6 App. Cas. 740, 50 L. J. Q. B. 689, affirming the decision of the C. A. and the judgment of Lush, J., who dissented in the court below].

But it is otherwise if the owner of land adjoining a newly built house dig in a similar manner and produce similar results, for there, though there is damage, yet, as there is no right to support, there is no injury committed by withdrawing it, and, therefore, no action maintainable; Partridge v. Scott, 3 M. & W. 220; Wyatt v. Harrison, 3 B. & Ad. 871. But then the person digging must not do so negligently, otherwise [it would seem] he is liable to action. See Dodd v. Holme, 1 A. & E. 493; Grocers' Co. v. Donne, 3 Bing. N. C. 34; Trower v. Chadwick, 3 Bing. N. C. 334, and the same case reversed in C. S. 6 Bing. N. C. 1; Davis v. London and Blackwall Rail., 1 M. & G. 799, 2 Sc. N. R. 72; Bradbee v. Mayor of London, 5 Scott. N. R. 79, 4 M. & G. 714, 2 Dowl. M. S. 164. [See, however, Gale on Easements, p. 250 et seq., 2 Wms. Saunders, p. 802 et seq., and Jeffries v. Williams, 5 Exch. 792 n.]

But it is settled by *Chadwick* v. *Trower*, in Cam. Scac. 6 Bing. N. C. 1, that even supposing that an action could be brought for the mere omission to take care while pulling down one's own property that a neighbor's property should not be injured, still the duty to take such care does not extend to cases where the defendant is not shown to have had notice of the existence or nature of the property injured, as where it was a vault. In consequence of this decision, it will probably become usual in actions of this sort to traverse notice of the nature or existence of the property. [See *The Submarine Telegraph Co. v. Dickson*, 15 C. B. N. S. 759, 33 L. J. C. P. 139.

But whatever be the rights of the owner of the adjoining land who digs near a newly built house, it is clear that a mere stranger has none, and is liable for the damage occasioned by so doing, Jeffries v. Williams, ubi sup.; Bibby v. Carter, 4 H. & N. 153. And as there is a common-law right to have the soil in its natural unencumbered state left undamaged by the withdrawal of lateral support, the owner of a newly built house may maintain an action for damage done by the withdrawal (however carefully) of such support, provided that the weight of the house itself did not occasion or contribute to the subsidence, and the damage to the house may be recovered as consequential upon the original injury, Brown v. Robins, 4 H. & N. 186; Hamer v. Knowles, 6 H. & N. 454; Berkeley v. Shafto, 15 C. B. N. S. 79, 30 L. J. Exch. 102. In the case of Smith v. Thackerah, the Court of Common Pleas would seem at first sight from the report, L. R. 1 C. P. 564, to have decided that the damage arising from the subsidence of the soil itself must be more than nominal in order to constitute such an injury as can be made the foundation of an action for the consequential damages resulting therefrom. In that case the defendant by excavations in his own land caused the plaintiff's soil to subside, and a building erected within twenty years and standing thereon was damaged in consequence. The jury found that

the plaintiff's land would have sunk if there had been no building on it, but that the plaintiff would have suffered no appreciable damage, and it was held that the plaintiff had no cause of action. In the report, however, of the same case in 35 L. J. C. P. 276, it does not clearly appear that the buildings did not contribute to the subsidence (see argument of defendant's counsel and the judgment of Byles, J.); and the finding of the jury that had the building not been there the plaintiff would have suffered no appreciable damage was perhaps equivalent to a finding that the subsidence which would have taken place had the building not been there would have been inappreciable, and that the weight of the buildings contributed to the subsidence which actually took place — in which case no appreciable damage, actual or consequential, resulted from an invasion of any right of the plaintiff, and the action was clearly not maintainable. Unless such be the true ratio decidendi, the decision would appear to conflict as well with principle as with the cases of Brown v. Robins and Hamer v. Knowles, above cited, in neither of which does it appear that but for the existence of the buildings the pecuniary damage by the mere subsidence of the soil would have been more than nominal. No doubt in order to prove that a right has been invaded it is necessary to show that an actual sensible subsidence of the natural soil has taken place through the act of the defendant, but if this be established and further damage consequent thereon be incurred, surely the latter may be recovered, even though the damage by the mere letting down of the unencumbered soil were incapable of pecuniary assessment. Indeed, in most cases, the pecuniary damage occasioned by the sinking of the unencumbered soil itself must be merely nominal, but when two things have concurred - viz., the invasion of a right and damage consequent thereon — the courts have held that such damage is recoverable by action. See the observations of Bowen, L. J., in Mitchell v. Darley Main Colliery Co., 14 Q. B. D. 125, 53 L. J. Q. B. 471, at p. 137 of L. R., which seem to support the view of Smith v. Thackerah, stated in the above note. In that case it was held by the House of Lords (Lord Blackburn dissenting), affirming the decision of the C. A., and overruling Lamb v. Walker, 3 Q. B. D. 389, that where the surface has subsided by reason of excavations, and a cause of action has accrued to the owner of the surface which has been satisfied by damages, he may nevertheless maintain an action for a second subsidence consequent upon the original excavation, 11 App. Cas. 127, 55 L. J. Q. B. 529.

As to the right of a purchaser who has bought land for the purpose, known to his vendor, of erecting buildings thereon, to restrain by injunction his vendor from suffering excavations to be made in his own land, which would probably result in letting down the land sold, and the buildings about to be erected thereon, although no covenant against such excavation have been taken by the purchaser, and no damage have actually occurred, see *Siddons* v. *Short*, 2 C. P. D. 572, a case which, so far at least as regards the protection claimed for the added weight of the buildings, appears open to further consideration.

The right of a man to dig in his own land is not qualified by the fact that the land intervening between his and that of another owner has been excavated, and he is not responsible if, by so doing, he causes the land of another to fall in, if it would not have fallen in but for the intervening excavation, Corporation of Birmingham v. Allen, 6 Ch. D. 284, 46 L. J. Ch. 673.

As to the right to have one house supported by another, see Solomon v. Vintners' Co., 4 H. & N. 586; Lemaitre v. Davis, 19 Ch. D. 281, 51 L. J. Ch. 173; and where a row of houses originally belonged to the same owner. Richards v. Rose, 9 Exch. 218. As to the mutual rights and liabilities of the owners and occupiers of different floors in the same house, see Ross v. Fedden, L. R. 7 Q. B. 661,

41 L. J. Q. B. 270; Carstairs v. Taylor, L. R. 6 Ex. 217, 40 L. J. Ex. 129; of adjoining premises in reference to sewage, Humphreys v. Cousins, 2 C. P. D. 239, 46 L. J. C. P. 438.]

The maxim which governs such cases is sic utere tuo ut alienum non lædas. [Bonomi v. Backhouse, supra; and see the elaborate judgment of Blackburn, J., in Fletcher v. Rylands, 35 L. J. Exch. 154, L. R. 1 Exch. 265, 3 H. L. 330, in which case it was laid down as a principle, "that the person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is, primâ facie, answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major or the act of God."] Therefore, A. may be sued for so negligently erecting a hayrick on the edge of his land that it ignites and burns his neighbor's house, Vaughan v. Menlove, 3 Bing. N. C. 468; notwithstanding 6 Anne, c. 31, and 14 Geo. 3, c. 78, which do not, it seems, apply to fires traceable to negligence. See the observations of Lord Lyndhurst in Viscount Canterbury v. The Attorney-General, 1 Phillips, 306, and Filliter v. Phippard, 11 Q. B. 347, where the subject of liability for damage by fire was discussed [and see Exp. Goreley, 34 L. J. Bkcy. 1; and Fletcher v. Rylands, 3 H. & C. 774, 34 L. J. Exch. 177]. For examples of the general rule in cases of fire caused by railway engines, see Aldridge v. The Great Western Rail., 3 M. & Gr. 515, 4 Scott, N. R. 156, 1 Dowl. N. S. 247, S. C.; Piggott v. The Eastern Counties Rail., 3 C. B. 229 [Vaughan v. The Taff Vale Rail. Co., Cam. Scac. 5 H. & N. 679; 29 L. J. Exch. 247 (questioned by Bramwell, L. J., in Powell v. Fall, 5 Q. B. D. 597, 49 L. J. Q. B. 428); Freemantle v. The London and South-Western Rail. Co., 10 C. B. N. S. 89, 31 L. J. C. P. 12; Smith v. London and South-Western Rail. Co., L. R. 6 C. P. 14, 40 L. J. C. P. 21; and Jones v. Festiniog Rail. Co., L. R. 3 Q. B. 733, 37 L. J. Q. B. 214, where there being no statutory powers to run steam locomotives the company was held liable, although actual negligence was negatived; of their liability for a nuisance by smoke from their engines, Smith v. Midland Rail. Co., 26 W. R. 10. For the principle of these cases compare Dunn v. Birmingham Canal Co., L. R. 7 Q. B. 244, 8 Q. B. 42, 41 L. J. Q. B. 121, 42 id. 34; Madras Rail. Co. v. Zemindar of Carvetinagarum, 22 W. R. 865, P. C.; Dixon v. Met. B. of Works, 7 Q. B. D. 418]. As to the liability of a gas company for an explosion caused by the escape of gas through a stop-cock over which they had no control, see Holden v. The Liverpool Gas Co., 3 C. B. 1 [Blenkiron v. The Great Central Gas Consumers' Co., 2 F. & F. 437; in Blyth v. Birmingham Waterworks Co., 11 Exch. 781, a water company was held not liable for the escape of water from their pipes owing to an extraordinary frost (but see Great Western Rail. Co. Canada v. Braid, 1 Moore, N. S. 101). In Nichols v. Marsland, L. R. 10 Ex. 255, affirmed 2 Ex. D. 1; 46 L. J. Ex. 174, a like immunity was extended to the owner of artificially collected ornamental water which escaped by reason of an extraordinary rainfall. On the other hand, where the defendants, a railway company, in order to save their embankment, against which a large quantity of water caused by an unprecedented rainfall had accumulated, cut trenches which allowed the water to pass through the embankment on to the plaintiff's land which lay at the lower side of it, they were held to be liable for the damage done to the plaintiff's crops, Whalley v. Lanc. & York. Rail. Co., 13 Q. B. D. 131, 53 L. J. Q. B. 285. As to the liability of the occupier of land for damages to his neighbor by percolation of rain water, artificially caused to collect on his own land, see Broder v. Saillard, 2 Ch. D. 292; Hurdman v. North-Eastern Rail. Co., 3 C. P. D. 168, 47 L. J. C. P. 368; Snow

v. Whitehead, 27 Ch. D. 588, 53 L. J. Ch. 885; his non-liability where such collection and percolation is the result of what may be called the natural user of his own land, Wilson v. Waddell, 2 App. Cas. 95; his liability for the percolation of sewage from his own well into that of his neighbor, Ballard v. Tomlinson, 29 Ch. D. 115, 54 L. J. Ch. 454; his liability for decay of fences whereby his neighbor's cattle are injured, Firth v. Bowling Ironworks Co., 3 C. P. D. 254, 47 L. J. C. P. 358. The occupier of a shop in a street in a market town cannot complain of damage done by an ox entering his shop while being driven along the street unless there was negligence on the part of the defendant or his servants in driving it, Tillett v. Ward, 10 Q. B. D. 17, 52 L. J. Q. B. 61.

See further, with reference to the above maxim, Kearney v. London and Brighton Rail. Co., L. R. 5 Q. B. 411, 6 Q. B. 750, 39 L. J. Q. B. 200; Wilson v. Newberry, L. R. 7 Q. B. 31, 41 L. J. Q. B. 31; Smith v. Fletcher, L. R. 7 Exch. 305, 41 L. J. Exch. 193, reversed in error, L. R. 9 Ex. 64, 43 L. J. Ex. 70; West Cumberland Iron Co. v. Kenyon, 11 Ch. D. 782, 48 L. J. Ch. 793; Fletcher v. Smith, 2 App. Cas. 781, 47 L. J. Ex. 4; and for instances of the owner's inability to escape responsibility, by delegating even to competent agents the duty of precaution, see Terry v. Ashton, 1 Q. B. D. 314, 45 L. J. Q. B. 260; Bower v. Peate, 1 Q. B. D. 321, 45 L. J. Q. B. 446; Hughes v. Percival, 8 App. Cas. 443, 52 L. J. Q. B. 719.]

Very similar to the case of a man digging on the extremity of his own land is that of one digging on his own close, so as to divert the underground stream, or drain the well of a neighbor. This, in the absence of some special right to such stream or well, is damnum absque injurià, Acton v. Blundell, 12 M. & W. 324; see Dickinson v. Grand Junction Canal Co., 7 Ex. 282 [New River Co. v. Johnson, 6 Jurist N. S. 374; Rawstron v. Taylor, 11 Ex. 369; Broadbent v. Ramsbotham, Ib. 602; Chasemore v. Richards, 7 H. L. C. 349, 29 L. J. Ex. 81; and Hodgkinson v. Ennor, 4 B. & S. 229, 32 L. J. Q. B. 231. And if a subsidence be caused by the withdrawal of such underground water, the same rule holds good, Popplewell v. Hodgkinson, L. R. 4 Ex. 248, 38 L. J. Ex. 126; cf. Corbett v. Hill, 39 L. J. Ch. 547.]

The mode of determining whether damage have or have not been occasioned by what the law esteems an injury, is to consider whether any right existing in the party damnified have been infringed upon; for if so, the infringement thereof is an injury: and if an injury be shown, the law will presume that some damage resulted from it. See Barker v. Green, 2 Bing. 317 [Sampson v. Hoddinott, 1 C. B. N. S. 590]. And an action is maintainable against one who makes a projection over the land of another before any rain falls so as to cause damage, Fay v. Prentice, 1 C. B. 828. To use Lord Holt's words in the present case: -"Every injury to a right imports a damage in the nature of it, though there be no pecuniary loss;" for instance, before the abolition of imprisonment for debt a creditor who was ascertained to be such by a judgment, and had charged his debtor in execution, had a right to the body of his debtor every hour till the debt was paid. Per Buller, J., 5 T. R. 40. He had a right to have the body in jail, and the escape of a debtor for ever so short a time was necessarily a damage to him, and an action for an escape lay. Per Parke, B., 4 M. & W. 153; Clifton v. Hooper, 6 Q. B. 468.

But where a defendant was in custody on mesne process and after the return of the writ by which he was captured, the plaintiff's right was "to have the defendant in custody whenever he chooses to remove or declare against him;" and, therefore, although an escape which delayed the execution of a habeas corpus or the delivery of a declaration would have been actionable, yet an escape involving neither of those consequences was not so, Williams v. Mostyn, 4 M.

& W. 145; Planck v. Anderson, 5 T. R. 37. [Upon the same principle an action will not lie against the sheriff for a false return to a writ of execution, if the plaintiff has not suffered actual damage in consequence of the false return, Wylie v. Birch, 4 Q. B. 566; Levy v. Hale, 29 L. J. C. P. 127; Hobson v. Thelluson, L. R. 2 Q. B. 642; Stimson v. Farnham, L. R. 7 Q. B. 175, 41 L. J. Q. B. 52.] So, if a landlord distrain for more rent than is due, an action does not lie against him if the goods he take be of less value than the rent actually due, Leyland v. Tancred, 16 Q. B. 664 [Acc. Glyn v. Thomas, 11 Exch. 870; French v. Phillips, 1 H. & N. 564. The distinction is really in the nature of the right itself. If the right be absolute, its infringement implies damage; but if it be merely a qualified right, as for instance to have one's land left undamaged by the withdrawal of lateral support (Bonomi v. Backhouse, 28 L. J. Q. B. 381), actual damage is necessary to complete the cause of action. And see Mitchell v. Darley Main Colliery Co., supra, p. 315. So in the cases above cited the plaintiff's rights, as against the sheriffs and the landlord, were merely qualified rights to be saved from pecuniary loss by the defendant's acts, and as a necessary consequence actual damage was held essential to the cause of action. And see the notes to Mellor v. Spateman, 1 Wms. Saund. 346 a.]

There are, indeed, certain cases in which an act may be in law an injury, and may produce damage to an individual, and yet in which the law affords no remedy, or, at least, no immediate one. These are cases in which the act done is a grievance to the entire community, no one of whom is injured by it more than another. [See Winterbottom v. Lord Derby, L. R. 2 Ex. 316.] In such a case the mode of punishing the wrongdoer is by indictment, and by indictment only. 1 Inst. 56, a. [See Ricketts v. Metropolitan Rail. Co., 5 B. & S. 149, 34 L. J. Q. B. 261; affirmed L. R. 2 H. L. 175, 36 L. J. Q. B. 205.] Still, if any person have sustained a particular damage therefrom, beyond that of his fellow-citizens, he may maintain an action in respect of that particular damnification. Thus to use the familiar instance put by the text-writers, if A. dig a trench across the highway, this is the subject of an indictment; but if B. fall into it, then the particular damage thus sustained by him will support an action [and see Lyon v. Fishmongers' Co., 1 App. Cas. 662, 46 L. J. Ch. 68; Fritz v. Hobson, 14 Ch. D. 542, 49 L. J. Ch. 735].

Still this exception is subject to qualification, for the damage must not be occasioned by want of ordinary skill and care on the part of the plaintiff, Butterfield v. Forrester, 11 East, 60 [and the like rule applies to all cases where the cause of action is negligence]; Flower v. Adam, 2 Taunt. 314; Bridge v. Grand Junction Co., 3 M. & W. 244 (which see as to the form of plea in such a case). Hawkins v. Cooper, 8 C. & P. 473; Coles v. Bank of England. 10 A. & E. 437; Morrill v. Stanley, 1 M. & G. 568 [and Caswell v. Worth, 5 E. & B. 849, where the defendants were bound by statute to keep their machinery fenced, but omitted so to do, and yet they were held not to be liable to the plaintiff for an injury which he received from the machinery by setting it in motion, contrary to their orders, and with knowledge that it could not be used with safety. Contra where he was guilty of no misconduct, though he knew of the danger, Holmes v. Clarke, 6 H. & N. 349; cf. Watling v. Oastler, L. R. 6 Ex. 73, 40 L. J. Ex. 43; Britton v. Great Western Cotton Co., L. R. 7 Ex. 130, 41 L. J. Ex. 99; Woodley v. Mid. Rail. Co., 2 Ex. D. 384, 46 L. J. Ex. 521].

However, where a man carelessly left his cart and horse unattended in the street, and a young child climbed into it and had a severe fall, the horse being led forward by a boy, the owner was held responsible in this case, seemingly on the ground that, having thrown temptation in the child's way, he could not be allowed to object that it had yielded to it: Lynch v. Nurden, 1 Q. B. 29; but see,

as to that case, Lygo v. Newbold, 9 Exch. 302 [Singleton v. Eastern Counties Rail. Co., 7 C. B. N. S. 287; Mangan v. Atherton, 35 L. J. Exch. 161 (a case which has recently been observed upon in Clark v. Chambers, 3 Q. B. D. 324, 47 L. J. Q. B. 427); and Abbott v. Macfie, 2 H. & C. 744, 33 L. J. Exch. 177].

And the rule is not that any negligence on the plaintiff's part will preclude him from recovering; but, that though there has been negligence on the plaintiff's part, still he may recover, unless he could by ordinary care have avoided the consequence of the defendant's negligence. Therefore, a man who had improperly left an ass fettered on the highway was nevertheless held entitled to recover against one who negligently drove against it, Davies v. Mann, 10 M. & W. 546 [and the owner of a barge which, while sailing down the Thames, was negligently run into by a steamer, was held entitled to recover against the pilot of the steamer, who might easily have avoided her, although (contrary to the 17 & 18 Vict. c. 104, sect. 296) the helm of the barge was not ported on the approach of the steamer, and nobody on board the barge was keeping a lookout, Tuff v. Warman, 2 C. B. N. S. 740; Exch. Cham. 5 C. B. N. S. 573. "In some cases," said Lord Campbell, C. J., in Dowell v. The General Steam Navigation Co., 5 E. & B. 195, "there may have been negligence on the part of the plaintiff, remotely connected with the accident; and in those cases the question arises whether the defendant, by the exercise of ordinary care and skill, might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often quoted donkey case, Davies v. Mann. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident, within the rule upon this subject: and if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he, and he only, proximately causing the loss;" and see The Netherlands Steamboat Co. v. Styles, 9 Moore, Priv. C. C. 286]; Smith v. Dobson, 3 M. & Gr. 59; and Mayor of Colchester v. Brooke, 7 Q. B. 339, where oysters were placed in the channel of a public navigable river so as to create a public nuisance, yet a person navigating the river was holden not justified in running his vessel against them, when he had room to pass without so doing [quære the effect upon this case of the judgments in Gann v. Whitstable, 11 House of L. 192, 35 L. J. C. P. 29]; Dimes v. Petley, 15 Q. B. 276 [Bateman v. Bluck, 18 Q. A. 870; Witherby v. Regent's, &c., Co., 12 C. B. N. S. 1].

If a way is made dangerous by an obstruction, and a person being to some extent aware of the danger yet risks it, and is injured, he may still maintain an action for the injury, unless the danger was so obvious that it was against common prudence to encounter it, Clayards v. Dethick, 12 Q. B. 439 [and see Thompson v. North-Eastern Rail. Co., Cam. Scac. 2 B. & S. 106, 31 L. J. Q. B. 194; Holmes v. Clark, 6 H. & N. 349, 31 L. J. Exch. 356, Cam. Scac.; Wyatt v. The Great Western Rail. Co., 34 L. J. Q. B. 204; Adams v. Lancashire and Yorkshire Rail. Co., L. R. 4 C. P. 739, 38 L. J. C. P. 277. But compare Gee v. Metropolitan Rail. Co., L. R. S Q. B. 161, 42 L. J. Q. B. 105, where the latter decision is questioned. This question of contributory negligence has been recently much discussed and has given rise to considerable diversity of opinion in cases against railway companies. See Bridges v. North London Rail. Co., L. R. 7 H. L. 213: Met. Rail. Co. v. Jackson, 3 App. Ca. 193, 47 L. J. Q. B. 303; Slattery v. Dublin-Wicklow Rail. Co., 3 App. Cas. 1155; Davey v. L. S. W. Rail. Co., 12 Q. B. D. 70, 53 L. J. Q. B. 28; Wakelin v. L. & S. W. Rail. Co., 35 W. R. 141].

In Bridge v. Grand Junction Rail., supra, in an action at the suit of a passenger by the train of a railway company against another railway company, with

a train of which a collision had taken place, whereby the passenger had sustained injury, the defendants pleaded that the injury was caused in part by the negligence of the person who had the management of the train in which the plaintiff was riding. The plea was holden bad in substance, for not showing that by ordinary care on the part of the person managing the train in which the plaintiff was the collision might have been avoided. A hasty perusal of the report of that case might lead to the supposition that, according to the opinion of the court, the plea might have been made good in substance, though not in form, by an averment that the plaintiff's driver could by ordinary care have avoided the accident; but that result does not by any means follow from what the learned judges said, much less from what they actually decided. It may, perhaps, be considered that the plea was at all events bad in substance, for not alleging that the passenger who brought the action was guilty of negligence. If two drunken stage coachman were to drive their respective carriages against each other and injure the passengers, each would have to bear the injury to his own carriage, no doubt, but it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer. This, nevertheless, appeared to be the result of the decision in Thorogood v. Bryan, 8 C. B. 115; but [in former editions of this work it was] questioned whether the reasoning of the court in that case was consistent with Rigby v. Hewitt, 5 Exch. 240; and Greenland v. Chaplin, 5 Exch. 243; or with the series of decisions from Quarman v. Burnett, 6 M. & W. 499, to Reedie v. London & North-Western Rail. Co., 4 Exch. 244 [followed by Dayrell v. Tyrer, 28 L. J. Q. B. 52; and The Milan, 31 L. J. Prob. Mat. & Adm., where Dr. Lushington declined to act on Thorogood v. Bryan. And it was suggested that the question why in this particular case both the wrongdoers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, deserved more consideration than it received in Thorogood v. Bryan. [See Waite v. North-Eastern Rail, Co., E. B. & E. 719, and per Williams, J., in Tuff v. Warman, 2 C. B. N. S. 740. Thorogood v. Bryan, however, after having been approved and followed by the Court of Exchequer in Armstrong v. L. & Y. Rail. Co., L. R. 10 Ex. 47, 44 L. J. Ex. 89, was overruled by the Court of Appeal in The Bernina, W. N. 1887, 20 (reversing 11 P. D. 31), when the above comments of previous editors of this work were quoted with approval by the court.

In Child v. Hearn, L. R. 9 Ex. 176, a servant of a railway company was injured by an accident to a trolly, caused by pigs which had strayed from the defendant's field on the line through the default of the company in not repairing a fence, it was held to that as no action could have been brought by the company, so neither could their servant, using his master's property for his master's service, be in any better position.

As to the contributory negligence or wrongful act of a stranger intervening, see Burrows v. March Gas Co., L. R. 5 Ex. 67, 39 L. J. Ex. 33; Clark v. Chambers, 3 Q. B. D. 327, 47 L. J. Q. B. 427; Sneesby v. L. & Y. Rail. Co., 1 Q. B. D. 42, 45 L. J. Q. B. 1.

It has been questioned whether the doctrine of contributory negligence applies to the case of tort in the execution of a contract. *Martin* v. *The Great Northern Rail*. Co., 16 C. B. 179. [But see per Lord Campbell, C. J., in Waite v. North-Eastern Rail. Co., E. B. & E. 719. In that case, a child, about five years old, was taken by his grandmother to a railway station where she got tickets for herself and him for a train, to get to which it was necessary to cross the line of railway. In crossing the line with the child, about a quarter of an

hour before the train was due, she was killed, and the child was injured by another train. These disasters were caused both by the neglect of the railway company to give her warning of the danger, and by her own negligence. The child brought an action against the company, for the hurt which he had suffered, but the action was held not to be maintainable on two grounds: namely, that the grandmother was the contracting party in respect of the tickets, and had undertaken to take due care of the child, and that the child was identified with her in respect of the negligence on her part which had contributed to the accident.]

And though the damage and wrong be excessive, and peculiarly concern an individual, still, if it amount to a felony, the private remedy is suspended until public justice shall have been satisfied: a very wholesome rule, and tending to prevent the composition of felonies under the pretence of seeking remedy by action. [This rule was applied by Willes, J., in the case of Wellock v. Constantine, 32 L. J. Exch. 285, where a servant girl brought an action of assault against her master, and having proved a rape, for which he had not been prosecuted, was non-suited, and the non-suit was upheld by the Court of Exchequer, dissentiente Martin, B. More recently, however, the subject both of the rule itself and its application was much considered in the case of Wells v. Abrahams, L. R. 7 Q. B. 554, 41 L. J. Q. B. 306. The action was for the conversion of jewelry, the pleas being "not guilty," and "not possessed," and the verdict having passed for the plaintiff, a rule for a new trial was obtained on the ground that the evidence proved a felony, which had not been prosecuted, and that the learned judge ought therefore to have non-suited or directed a verdict for the defendant. The court, however, discharged the rule, refusing to follow the authority of Wellock v. Constantine, and being unanimously of opinion that though there was authority that such a rule existed, it could not be applied in the manner contended, inasmuch as the judge was a mere instrument for trying the issues upon the record. Some of the court also gave weight to the objection that the defendant, while denying the commission of the felony, could not be allowed to set up the rule. The court expressed themselves with great hesitation as to how the rule in question, supposing it to exist, could be put into operation, and it is submitted that the effect of this decision will be to render the rule itself a nullity in most cases, since it would seem the defendant cannot raise the defence by plea, Lutterell v. Reynell, 1 Mod. 282. The decision itself is in conflict with numerous authorities besides that of Wellock v. Constantine. See Prosser v. Rowe, 2 C. & P. 421; Hayes v. Smith, Sm. & Bat. 378; Quinlan v. Barber, Bat. 47; Gordon v. Flusky, 1 Arm. Mac. & Og. 155, and for the American cases see Bishop's Criminal Law, 6th ed., i. § 267. See also Fissington v. Hutchinson, 15 L. T. N. S. 390; Chowne v. Baylis, 31 L. J. Ch. 757. As regards the question of the issues, assuming the existence of the rule of law above stated, it might perhaps be contended that in an action of conversion, where the plaintiff proves facts amounting not to a mere conversion, but to a felony, for which the defendant had not been brought to justice, the issue upon not guilty should be properly decided in favor of the defendant, and that the judge would be in exactly the same position, as to non-suiting, as in other cases, where he is obliged to form his own judgment upon the facts proved in order to determine whether or not they amount to a legal cause of action. See further Ex parte Ball, 10 Ch. D. 667, 48 L. J. Bey. 57; Midland Insurance Co. v. Smith, 6 Q. B. D. 561.]

The above stated rule, however, does not apply to actions against others than the person guilty of the felony, White v. Spettigue, 13 M. & W. 603 [Osborn v. Gillett, L. R. 8 Exch. 88; Appleby v. Franklin, 17 Q. B. D. 93; Lee v.

Bayes, 18 C. B. 599]. And the statute 9 & 10 Vict. c. 93, for compensating the families of persons killed by accidents, while it recognizes the general rule, expressly enacts that it shall not apply to actions brought pursuant to its provisions. [See Osborn v. Gillett, ubi supra.] See Com. Dig. Action on the Case (B. 5).

Again, there are some cases in which a damage is sustained by one man in consequence of the act of another, which act would be considered tortious by the law, if the damage incurred could be properly deduced from it; but which, nevertheless, is dispunishable, because the damage actually incurred is, to use the legal phrase, too remote to be the subject-matter of an action; in other words, because it is not the natural consequence of the act committed by the defendant. [Thus, if the plaintiff is made ill and put to medical expense by the defendant's slander of him by words not actionable per se, that will not be sufficient special damage to support an action for the slander, Allsop v. Allsop, 5 H. & N. 534; Weldon v. De Bathe, 54 L. J. Q. B. 113; see also Richardson v. Dunn, 8 C. B. N. S. 655; Parkinson v. Scott, 1 H. & C. 153; S. C. 31 L. J. Exch. 331; Chamberlain v. Boyd, 11 Q. B. D. 407, 52 L. J. Q. B. 277]; Com. Dig. Action on case for Defamation; and Kelly v. Partington, 5 B. & Ad. 645.

And it has been thought that damage must always be considered too remote when it proceeds from the illegal act of a third person, for that the law will not esteem it natural that an illegal act should be induced by any consideration. Thus, if A. falsely assert that B. has spoken in disparagement of C., in consequence of which C. ceased to be riend and invite B., an action would be maintainable; see Moore v. Meagher, 1 Taunt. 39 [Davis v. Solomon, L. R. 7 Q. B. 112, 41 L. J. Q. B. 10]; but if C. were in consequence to beat B., no action could be maintained by him against A. on account of the damage sustained from the beating. So in Vicars v. Wilcox, 8 East, 1, where the defendant accused the plaintiff of unlawfully cutting his (the defendant's) cord, in consequence of which J. O. dismissed plaintiff from his service before the expiration of his year, Lord Ellenborough said, "that the special damage must be the legal and natural consequence of the words spoken; and here it was an illegal consequence, a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had seized the plaintiff and thrown him into a horse pond for his supposed transgression." See Morris v. Langdale, 2 B. & P. 284; Knight v. Gibbs, 1 A. & E. 43; Ashley v. Harrison, 1 Esp. 48; Ward v. Weeks, 7 Bing. 211, 4 M. &. P. 796 [Dixon v. Smith, 5 H. & N. 540; Parkinson v. Scott, 1 H. & C. 153, 31 L. J. Exch. 331]. This doctrine, however, has been questioned: see Green v. Button, 2 C. M. & R. 707; Kendillon v. Maltby, 1 Car. & M. 402, Lord Denman, C. J.; Haddon v. Lott [15 C. B. 411]; Sedgwick on Damages, 66, and 1 Stark. on Libel, 205, and the notes to Vicars v. Wilcox, post, vol. ii.

This note would not be complete without a reference to the modern case of Lumley v. Gye [2 E. & B. 216], in which it was held by the majority of the Court of Queen's Bench (Coleridge, J., dissenting) that an action was maintainable for maliciously causing and procuring one of two contracting parties not to perform the contract, whereby loss accrued to the other. This case, not having been one of master and servant, was of the first impression, and inasmuch as by reason of the defendant having obtained a verdict, it became unnecessary to take the opinion of a court of error [there was room for] further discussion. See the very learned and elaborate judgment of Coleridge, J., as to the origin of the action for seducing servants from their duty. [The point has, however, been decided by Bowen v. Hall, 6 Q. B. D. 333, 50 L. J. Q. B. 205, which (dissentiente Lord Coleridge, C. J.) affirmed the decision of the majority in Lumley v. Gye.]

The decision in this particular case of Ashby v. White occasioned one of the most furious controversies between the Houses of Lords and Commons of which there is any example in English history. A full account, setting forth at large the parliamentary documents respecting it, will be found in the notes to Mr. Gale's excellent edition of Lord Raymond, pp. 597 to 608. It arose from an idea entertained by the Commons that the attempt to bring a case involving the right to the elective franchise before a court of law was a high breach of the privileges of their house: and they proceeded so far as to order that Mr. Mead (Ashby's attorney) [should be taken into custody] and [to commit] the plaintiffs in several similar actions [to Newgate]. Paty, one of these plaintiffs, sued out a habeas corpus to the keeper of Newgate, who returned the Speaker's warrant of commitment. On argument upon this return, Powell, Powys, and Gould, J. J., held, against the opinion of Lord Chief Justice Holt, that they had no authority to discharge the prisoner. On this decision Paty proposed to bring a writ of error, for which he applied, and the judges being summoned to deliver their opinion, whether a writ of error was a writ of right or of grace, ten of them were of opinion that it was of right, except in treason and felony. The parliament was, however, prorogued before the writs were issued, but not before the House of Commons, who appear to have been actuated by great indignation, had committed Mr. Cæsar, the cursitor, for neglecting to inform them what writs of error were applied for, and had also directed the sergeant-at-arms to take into custody Mr. Montague, Mr. Letchmere, Mr. Denton, and Mr. Page, who had been counsel for the prisoners on the return of the habeas corpus. Mr. Montague and Mr. Denton were accordingly apprehended, and the sergeant-at-arms informed the House "that he had also like to have taken Mr. Nicholas Letchmere, but that he had got out of his chambers in the Temple, two pair of stairs high, at the back window, by the help of his sheets and a rope." This gentleman was afterwards attorney-general. Writs of habeas corpus were served on the sergeant-at-arms on behalf of Mr. Montague and Mr. Denton, but the House forbade him to make any return thereto. At last, after two conferences between the Houses, which served only to widen the breach, the Queen put an end to the dispute by proroguing parliament. [See Hallam's Constitutional History of England, 6th ed., vol. ii. 436-439, 444.]

In the course of these discussions the Lords appointed a committee for the purpose of preparing an argument in the shape of a report upon the proceedings in the case of Ashby v. White. This argument was principally drawn up by the lord chief justice, and contains a masterly disquisition upon all the subjects connected with the case. It is printed entire in the note by Mr. Gale above referred to, and consists of three parts: first, it is argued that the plaintiff had a right to vote; secondly, that if so, he must, as a necessary consequence, as an inseparable incident to his right, have a remedy to assert and maintain it; thirdly, that his proper remedy was that which he had pursued, viz. by action. [See 6 Cobbett, Parliamentary History, 224.

It will be observed that the declaration in Ashby v. White charged the defendants with fraud and malice. Of this, according to the text, the lord chief justice took no notice. But according to a revised form of his judgment, prepared by the learned judge himself, he appears to have observed that, according to the very words of the Statute of Westminster, 1, c. 5, the action lay, because fraud and malice were alleged in the declaration, and had been proved (see the judgments of Lord Chief Justice Holt in Ashby v. White, and in the case of John Paty and others, published by Saunders & Benning, of Fleet Street, A.D. 1837, p. 12); and in the argument prepared by the Committee of the House of Lords, the fraud and malice are expressly stated to be the gist of the action. In

the words of that argument, "There is no danger to an honest officer that means to do his duty; for where there is a real doubt touching the party's right of voting, and the officer makes use of the best means to be informed, and it is plain his mistake arose from the difficulty of the case, and not from any malicious or partial design, no jury will find an officer guilty in such case, nor can any court direct them to do it; for it is the fraud and the malice that entitles the party to the action. In this case the defendants knew the plaintiff to be a burgess, and yet fraudulently and maliciously hindered him from his right of voting; and justice must require that such an unjust and ministerial officer should not escape with indemnity." 6 Cobbett, Parliamentary History, 314. And subsequently, in reference to Ashby v. White, the House of Lords resolved, "that by the known laws of this kingdom, every freeholder or other person having a right to give his vote at the election of members to serve in parliament, and being wilfully denied or hindered so to do by the officer who ought to receive the same, may maintain an action in the Queen's courts against such officer to assert his right, and recover damages for the injury:" and see 17 Lords' Journals, 707. Yet both Lord Holt and subsequently the House of Lords held the office of a returning officer to be merely ministerial. "That the officer is only ministerial in this case, and not a judge, nor acting in a judicial capacity, is most plain; his business is only to execute the precept, to assemble the electors, to make the election by receiving their votes, computing their numbers, and returning the persons elected; the sheriff or other officer of a borough is put to no difficulty in this case, but what is absolutely necessary in all cases. If an execution be against a man's goods, the sheriff must at his peril take notice what goods a man has." 6 Cobbett, Parliamentary History, 314 (and see Com. Dig. Viscount (C. 4), and the form of the writ, Dalton's Office of Sheriff, 337).

But in the great case of Barnardiston v. Soame, decided previously to Ashby v. White, and in which the House of Lords, affirming the judgment of the Exchequer Chamber, held that an action could not be maintained against a returning officer for having falsely and maliciously made a double return, North, C. J. (afterwards Lord Keeper Guilford), held the officer to be a judge as to declaring the majority, and therefore not liable, although he acted with fraud and malice. 6 Howell, State Trials, 1095 (see further as to the exemption of judges from civil liability, Garnett v. Ferrand, 6 B. & C. 625, 626; Fergusson v. Earl of Kinnoul, 9 C. & F. 251; Kemp v. Neville, 10 C. B. N. S. 523; and Thomas v. Churton, 31 L. J. Q. B. 139; Scott v. Stansfield, L. R. 3 Ex. 220, 37 L. J. Ex. 155; Dawkins v. Paulet, L. R. 5 Q. B. 94, 39 L. J. Q. B. 53; Dawkins v. Lord Rokeby, L. R. 8 Q. B. 255; Willis v. Maclachlan, 1 Ex. D. 376, 45 L. J. Ex. 689. These extremes were avoided by Lord Tenterden in Cullen v. Morris, 2 Stark. 587. "The returning officer," said his lordship, "is to a certain degree a ministerial one, but he is not so to all intents and purposes; neither is he wholly a judicial officer; his duties are neither entirely ministerial nor wholly judicial; they are of a mixed nature. It cannot be contended that he is to exercise no judgment, no discretion whatsoever, in the admission or rejection of votes; the greatest confusion would prevail if such a discretion were not to be exercised. On the other hand, the officer could not discharge his duty without great peril and apprehension if, in consequence of a mistake, he became liable to an action." This passage was cited with approbation in Tozer v. Child, Cam. Scace, 7 E. & B. 377. (See also Dalton's Office of Sheriff, 35, and the form of oath given by 2 Geo. 2, c. 24, s. 3; Fergusson v. Earl of Kinnoul, per Lord Brougham, 289; and as to the mode of directing the jury upon the question of malice, Drewe v. Coulton, 1 East. 563, note (a), 2 Luders, 244, note (F), and Cullen v. Morris.)

There are several instances of offices analogous to that of the returning officer for members of parliament, as it existed at common law, to which the principles above stated will apply; thus in Tozer v. Child, Cam. Scacc. 7 E. & B. 377, which was an action against church-wardens for maliciously rejecting the plaintiff's vote at an election for vestrymen, under the 18 & 19 Vict. c. 120, the defendants were held not to be liable, because it did not appear that they had acted maliciously (and see Buller, N. P. 64; Bac. N. Abr. Action on the Case (F), 1). But with regard to the returning officer of members of parliament, the 6 & 7 Vict. c. 18, s. 82, has made it unlawful for him to reject any vote tendered by a person whose name is on the register of voters, unless it appears to him, on putting to such person the questions as to identity, and as to whether he has voted before at the same election, that the person claiming to vote is not the person whose name appears on the register, or that he has voted before, or unless such person refuses to answer these questions, or to take either of the two oaths prescribed by the act. And, by s. 86, even if the person tendering the vote appears to be personating the registered voter, the officer is bound (if these questions are answered in the affirmative, and the oaths, if required, are taken) to receive the vote, though under protest. In Pryce v. Belcher, p. 303, supra, it appears to have been assumed that after the passing of this act, the officer might be liable to an action for damages for refusing to receive a vote wilfully, though not maliciously. But it was not necessary in that case to consider the effect of the 97th section of the act, which provides a particular remedy, namely, an action of debt for a penalty against the returning and other officers for every wilful misfeasance or wilful act of commission or omission contrary to the act, but preserves any remedy against any returning officer according to the law then in force. (See Stevens v. Jeacocke, 11 Q. B. 371; Shepherd v. Hills, 11 Exch. 55; St. Pancras, Vestry of, v. Batterbury, 2 C. B. N. S. 477.) Probably the breach of so plain a duty as that of the officer to receive the vote would in itself be deemed sufficient evidence to support an allegation of malice, if such were necessary. The duties cast upon presiding officers under the ballot act, 1872, 35 & 36 Vict. c. 33, sched. i., rule 21, are ministerial, and for a breach of them an action lies by a party who has thereby lost his election without proof of malice or want of reasonable care on the part of the defendant. Pickering v. James, L. R. 8 C. B. 489.

It may be useful to set forth here the rules laid down by Willes, J., with reference to remedies in cases of statutory liability, in the Wolverhampton Waterworks Co. v. Hawkesford, 28 L. J. C. P. 242. "There are," said the learned judge, "three classes of cases in which a liability may be established by statute. There is that class where there is a liability existing at common law, and which is only reënacted by the statute, with a special form of remedy; there, unless the statute contains words necessarily excluding the common-law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it . . . and with respect to that class it has been always held that the party must adopt the remedy given by the statute." He has a further remedy, however, by injunction either in equity or under s. 25, sub-s. 8, of the Judicature Act; Cooper v. Whittingham, 15 Ch. D. 501. In Couch v. Steel, 3 E. & B. 402, it was held that an action lay, at the suit of a sailor who had suffered special damage, against a shipowner for not supplying medicines pursuant to a statute which

imposed a penalty recoverable by a common informer. The principle laid down in that case, that wherever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of it may bring an action against the person on whom the duty is imposed, unless such remedy is impliedly excluded by the statute itself, was questioned in Atkinson v. Newcastle Waterworks Co., 2 Ex. D. 441, 46 L. J. Ex. 775. Exception was also taken to the position that where the penalty is not to go to the party grieved, he may maintain an action, although were the penalty made payable to him, he would have no other remedy; and it was pointed out that the intention must be gathered in each case from the general purview of the particular statute, a distinction being drawn between those which affect the rights of the whole public and those which partake of the nature of private legislation. It was held in that case that an action would not lie against a waterworks company for breach of a duty imposed on them by the Waterworks Clauses Act, 1847, and in respect of which a penalty was made recoverable by an informer, of keeping their pipes charged with water at a certain pressure, whereby the plaintiff, who, under the act, would have been entitled to use the water, was prevented from extinguishing a fire in his house; and see Gorris v. Scott, I. R. 9 Ex. 125; Ross v. Rugge Price, 1 Ex. D. 269, 45 L. J. Ex. 777; The Guardians of Holborn Union v. Vestry of St. Leonards, 2 Q. B. D. 145, 46 L. J. Q. B. 36; Vallence v. Falle, 13 Q. B. D. 109, 53 L. J. Q. B. 459.]

For some particulars of a [later] memorable conflict between the House of Commons and the Court of Queen's Bench, which cannot be stated within the limits of a note, see Stockdale v. Hansard, 7 C. & P. 731, 9 A. & E. 1, 11 A. & E. 253; the case of the Sheriff of Middlesex, 11 A. & E. 273; the statute of 3 & 4 Vict. c. 9; Stockdale v. Hansard, 11 A. & E. 297; Howard v. Gossett, 1 Car. & K. 380; Howard v. Gossett, 10 Q. B. 359; Gossett v. Howard, 10 Q. B. 411; Kielly v. Carson, 4 Moore, P. C. 63; and May's Law of Parliament, 125. [As to rights claimed by colonial legislatures similar to those of the House of Commons, see Speaker of Victoria v. Glass, L. R. 3 P. C. 560. Ashby v. White appears to have been acted upon in Milward v. Serjeant, Hil. T. 1786, without any interference upon the part of the House of Commons. See 1 East, 567, note; and 2 Luders, 248.]

It is not easy to gather from the imperfect reports of this case upon what precise grounds it was decided. The declaration charged the defendants, the presiding officers at the election, with malice in rejecting plaintiff's vote, and the jury found a verdict for plaintiff. Judgment upon this verdict was arrested in King's Bench by the vote of three judges against Ld. Holt, and judgment given for defendants. Upon a writ of error the House of Lords reversed this judgment, and gave judgment upon the verdict for plaintiff.

As stated by Ld. Ch. J. Abbott in Cullen v. Morris, 2 Starkie 577, at p. 588, "when a writ of error was brought, the record itself was conclusive as to the *malice* of the defendants, since the court could look at nothing beyond the record."

The reports, however, nowhere inform us of the character of the duties of the defendants; whether they were entirely ministerial or wholly judicial, or a mixture of both, we are not told. Nor are we enlightened as to the ground, if any, given for the rejection of the plaintiff's vote.

The malicious rejection of plaintiff's vote would have been actionable, no matter what the character of defendants' duties, whether ministerial or judicial, and, therefore, the nature of their duties became immaterial to the decision of the case.

We are, therefore, not at liberty, as some courts and writers have done, to infer from the fact that a malicious rejection of a vote by a presiding officer is actionable, irrespective of the character of his duties, that, therefore, no matter what the nature of his duties, he cannot be sued unless guilty of malicious or corrupt conduct. This case is not authority for the unlimited proposition that a presiding officer at an election can never be liable for rejecting a vote unless it is done maliciously or corruptly.

The duties of presiding officers at elections.— The duties of presiding officers at elections are generally of a mixed character, partly ministerial and partly judicial. For the violation of a ministerial duty, which causes an injury, the general rule applies, that they are liable whether they act in good or in bad faith. So far as their duties are judicial in their nature, i. e. require the exercise of judgment, the same measure of protection is accorded them by the law as is accorded corresponding judicial officers.

Classes of judicial officers. — Judicial officers are divided into two broad classes: judges of courts of superior or general jurisdiction and judges of courts of inferior or limited jurisdiction.

Liability of judges of courts of superior jurisdiction.—The rule of liability as to judges of courts of superior or general jurisdiction has been laid down by the Supreme Court of the United States in these terms: "Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter.

Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." Bradley v. Fisher, 13 Wall. 335.

Liability dependent upon jurisdiction.— The liability of judges of courts of superior or general jurisdiction, we thus see, depends upon the question whether they act with or without jurisdiction. If they act with jurisdiction, though subsequently they exceed this jurisdiction, they are not liable, and this even though they act maliciously and corruptly. Lange v. Benedict, 73 N. Y. 12; Randall v. Brigham, 7 Wall. 523; Bradley v. Fisher, 13 Wall. 335.

Liable if acting without jurisdiction.—If they act wholly without jurisdiction, then they are liable for any resulting wrong, though they act in perfect good faith; Bradley v. Fisher, 13 Wall. 335.

Limitation of last rule. — A limitation should be placed upon this last rule, where the want of jurisdiction is occasioned by some fact or circumstance applicable to a particular case of which the judge has neither knowledge nor the means of knowledge; Bradley v. Fisher, 13 Wall. 335; Clarke v. May, 2 Gray 410, and cases cited.

Liability of judges of courts of inferior jurisdiction. — The rules governing the liability of judges of courts of inferior or limited jurisdiction are as follows:—

Not liable if acting in good faith and within jurisdiction.—So long as they act within their jurisdiction and in good faith, they are not liable, no matter how erroneous their judgments; Yates v. Lansing, 5 John. 282; Bailey v. Wiggins, 5 Harr. 462; Phelps v. Sill, 1 Day 315.

Liable if acting without, or in excess of, jurisdiction.— If they act without jurisdiction, or in excess thereof, they are liable; Yates v. Lansing, 5 John. 282; Piper v. Pearson, 2 Gray 120; Clarke v. May, 2 Gray 410; Case v. Shepherd, 2 John. Ca. 27; Adkins v. Brewer, 3 Cow. 206.

Liable if acting maliciously though within jurisdiction. — Even though they act within their jurisdiction, yet, if they act maliciously and corruptly, they are liable; Hardison v. Jordan, Cam. & Nor. 512; Bailey v. Wiggins, 5 Harr. 462; Tompkins v.

Sands, 8 Wend. 462; Garfield v. Douglass, 22 Ill. 100. Contra, Pratt v. Gardner, 2 Cush. 63.

Not liable though acting without jurisdiction if occasioned by fact not known to the judge. — Judges of courts of inferior jurisdiction enjoy the same protection against liability as those of courts of superior jurisdiction when the want of jurisdiction is occasioned by a fact or circumstance applicable to a particular case of which the judge had neither knowledge nor the means of knowledge; Clarke v. May, 2 Gray 410, and cases cited; Calder v. Halker, 3 Moore Privy Council 28.

Liability of election officers performing ministerial duties. — Presiding officers of elections, so far as their duties are ministerial, are subject to the general rule applicable to all ministerial officers, and for a misfeasance or non-feasance resulting in an injury they are liable though they act in perfect good faith; Wilson v. The Mayor, etc., of the City of New York, 1 Denio 595; The Rochester White Lead Co. v. The City of Rochester, 3 N. Y. 463; Gillespie v. Palmer, 20 Wisc. 544; People v. Pease, 30 Barb. 588; Goetcheus v. Matthewson, 61 N. Y. 420; Silvey v. Lindsay, 107 N. Y. 55; Spragins v. Houghton, 3 Ill. 377; Bernier v. Russell, 89 Ill. 60; Hyde v. Brush, 34 Conn. 454. Cf. State v. Gordon, 5 Cal. 235.

Liability of election officers performing judicial duties. — So far as presiding officers of elections perform duties judicial in their nature, i. e. requiring the exercise of judgment, they are subject to the same rules as to liability as are judges of courts of inferior jurisdiction.

Acting within jurisdiction and in good faith.—If they act within their jurisdiction and in good faith they are not liable; State v. Porter, 4 Harr. 556; Carter v. Harrison, 5 Black. p. *138; State v. Robb, 17 Ind. 536; Chrisman v. Bruce, 1 Duvall 63; Morgan v. Dudley, 18 B. Mon. 693; Miller v. Rucker, 1 Brush 135; Bevard v. Hoffman, 18 Md. 479; Anderson v. Baker, 23 Md. 531; Elbin and ano. v. Wilson, 33 Md. 135; Friend v. Hamill, 34 Md. 298; Gordon v. Farrar, 2 Doug. 411; Pike v. Megoun, 44 Mo. 491; Wheeler v. Patterson, 1 N. H. 88; State v. Smith, 18 N. H. 91; State v. Daniels, 44 N. H. 383; Peavey v. Robbins, 3 Jones L. R. 339; Jackson v. Waldron, 11 John. 114; Weckerly v. Geyer, 11 S. & R. 35; Moran

v. Rennard, 3 Brewst. 601; Rail v. Potts, 8 Humph. 225; State v. Staten, 6 Cold. 233; Temple v. Mead, 4 Vt. 535; Fausler v. Parsons, 6 W. Va. 486.

Acting without or in excess of jurisdiction. — If they act without jurisdiction or in excess thereof, though in perfect good faith, they are liable; State v. Gordon, 5 Cal. 235; Long v. Long, 57 Ia. 497; Goetcheus v. Matthewson, 61 N. Y. 420.

Acting within jurisdiction but with malice. — If they act within their jurisdiction but with malice or corruption they will be liable; Chrisman v. Bruce, 1 Duvall 63; Morgan v. Dudley, 18 B. Mon. 693; Pike v. Megoun, 44 Mo. 491; contra, Fausler v. Parsons, 6 W. Va. 486 (semble).

Anomalous decisions. — In a few States the decisions are anomalous, and admittedly so.

Massachusetts.—In Massachusetts the early decisions were to the effect that the presiding officers would be liable for the rejection of a vote where the party offering to vote was a legal yoter, though no malice was shown; Kilham v. Ward, 2 Mass. 236; Gardner v. Ward, 2 Mass. 244, note; Lincoln v. Hapgood, 11 Mass. 350; Capen v. Foster, 12 Mass. 485; Oakes v. Hill, 10 Pick. 333; Keith v. Howard, 24 Pick. 292; Gates v. Neal, 23 Pick. 308.

In Massachusetts this rule has been somewhat changed, and the voter is now required to present to the election officers "sufficient evidence" of his qualifications as a voter. What is sufficient evidence is ultimately a question for the jury; Blanchard v. Stevens, 5 Met. 298.

Maine. — The Massachusetts rule as first established was followed in Maine, in Osgood v. Bradley, 7 Me. 411.

The rule in this State has since been modified, and such officers are not liable unless they are "unreasonable, corrupt, or wilfully oppressive" in their official acts; Sanders v. Getchell, 76 Me. 158; Pierce v. Getchell, 76 Me. 216.

Ohio. — The rule as originally laid down in Massachusetts seems to be still the law in Ohio; Anderson v. Millikin, 9 Ohio St. 568; Jeffries v. Ankeny, 11 Ohio 372; Thacker v. Hawk, 11 Ohio 376; Monroe v. Collins, 17 Ohio St. 665; Sutton v. McIlhany, 5 W. L. J. 356.

Damage no test of liability; violation of legal right the test.— The law guarantees to no man perfect security of reputation, liberty, or property; no man is recognized as having a legal right to such security; and, therefore, there are many acts done which occasion loss or damage to others, which nevertheless afford no subject of legal redress. The loss they occasion is, in the eye of the law, damnum absque injuria, because, though damage is done, no legal right is violated, and, therefore, no wrong or injury inflicted. It is legal rights which the law enforces or for the violation of which it gives redress. It is acts that violate a legal right which form the subject of legal redress. Nor does it make any difference that the violation of a legal right is not accompanied by actual damage. impossible to imagine," says Lord Holt, "any such thing as injuria sine damno. Every injury imports damage in the nature of it." To the same effect see the language of J. Story in Webb v. The Portland Mfg. Co., 3 Sumn. 189, 192; and that of Baron Parke in Embrey v. Owen, 6 Exch. *353, *368, approving J. Story's language.

The line which separates the class of acts which, though causing damage, violate no legal right, from those which violate a legal right and are the subject of legal redress, is shadowy and indistinct. "It rests frequently," says C. J. Green, in McGuire v. Grant, 1 Dutcher 356, 362, "upon grounds of public policy, or upon the mere force of authority, rather than upon

any clear or well defined principle."

Injury common to many not actionable forms no exception to the general rule. — Nor does the principle that for an injury general or common to many no action by an individual will lie form an exception to the general rule. In contemplation of law the injury is not to the individual, but to the community or State at large; it is the legal right of the State, and not that of the separate individual members, which is violated, and which forms the subject of redress. There may be damnum and damnum to the separate individuals constituting the community or State; but so long as the damnum to any one individual in no wise differs from that to every other individual, it is damnum absque injuria, because no individual's legal right is violated. But the instant an individual suffers special damage to person or property by reason thereof, it becomes a violation of his legal right, and forms the subject of an action.

Erroneous decision of a judge or jury is damnum absque injuriâ. — The erroneous decision of a judge of a court, whether of superior or of inferior jurisdiction, is an instance of damnum absque injuriâ, for which there is no legal redress; Bevard v. Hoffman, 18 Md. 479, 484; Lange v. Benedict, 73 N. Y. 12; Bradley v. Fisher, 13 Wall. 335.

The same is true of the erroneous decisions of a jury.

Ancient lights; no easement in light and air can be acquired by prescription. - The English rule of law that a right to have light and air pass to the windows of a building over adjoining land may be presumed from long and continuous undisputed enjoyment has been generally repudiated in the various jurisdictions of the United States. It is generally regarded as an anomaly in the law, and wholly unsuited to the circumstances of the country. The rule was first attacked with vigor and repudiated in Parker v. Foote, 19 Wend. 308, which case has been followed in every jurisdiction in which the question has arisen, with the exception of Delaware; Ward v. Neal, 37 Ala. 500; Ingraham v. Hutchison, 2 Conn. 584 (semble); Mitchell v. Mayor, etc., of Rome, 49 Ga. 19 (semble); Montgomery v. Trustees of Masonic Hall, 70 Ga. 38; Guest v. Reynolds, 68 Ill. 478 (semble); Dexter v. Tree, 117 Ill. 532 (semble); Stein v. Hauck, 56 Ind. 65; Lapere v. Luckey, 23 Kans. 534; Ray v. Sweeney, 14 Bush. 1; Pierre v. Fernald, 26 Me. 436; Cherry v. Stein, 11 Md. 1; Rogers v. Sawin, 10 Gray 376; Randall v. Sanderson, 111 Mass. 114; King v. Miller, 4 Halst. Chy. 559; Hayden v. Dutcher, 31 N. J. Eq. 217; Hieatt v. Morris, 10 Ohio St. 523; Haverstick v. Sipe, 33 Penn. St. 368; Napier v. Bulwinkle, 5 Rich. 311; Hubbard v. Town, 33 Vt. 295; Cunningham v. Dorsey, 3 W. Va. 293.

In Delaware the English rule is adopted, and it is held that a prescriptive right to light and air can be acquired; Clawson v. Primrose, 4 Del. Chy. R. 643. It has frequently been said that the same is true of Louisiana, and Durel v. Boisblanc, 1 La. Ann. R. 407, is given as the authority. In that case two adjoining lots with houses erected upon them had been sold by the same owner to different persons, and the decision rests upon the doctrine of an implied easement, and not upon prescription. The English doctrine was formerly supposed to be in force in Illinois also; Gerber v. Grabel, 16 Ill. 217. This case, however, will be found on examination not to support the

English doctrine. It turns simply on a question of pleading. However, it seems now that the law is settled to the contrary in Guest v. Reynolds, 68 Ill. 478, and Dexter v. Tree, 117 Ill. 532.

Implied easement in light and air. - A distinctly different question arises where the owner of two lots, upon one of which a building has been erected with windows overlooking the vacant lot, sells the lot with the building and himself retains or afterwards sells the vacant lot. The right, if any, which the purchaser of the lot and house would acquire to light and air would not rest upon length of enjoyment or prescription, but upon the implication of a grant of an easement. Story v. Odin, 12 Mass. 157, seems to have decided in favor of the implication of such an easement. This case, however, has since been overruled, in Keats v. Hugo, 115 Mass. 204. The following cases are in accord with Keats v. Hugo: Morrison v. Marquardt, 24 Iowa 35 (semble); Powell v. Sims, 5 W. Va. 1; Mullen v. Stricker, 19 Ohio St. 135; Turner v. Thompson, 58 Ga. 268; Rennyson's Ap., 94 Penn. St. 147. In Lampman v. Milks, 21 N. Y. 505, J. Selden, in an elaborate dictum, declared in favor of the doctrine of an implied easement. This dictum, however, has met with no favor, and in Palmer v. Wetmore, 2 Sand. 316, and Myers v. Gemmel, 10 Barb. 537, was disregarded. In New Jersey the doctrine of an implied easement has twice recently undergone consideration and been sustained. Sutphen et al Ex'rs. v. Therkelson, 38 N. J. Eq. R. 318; Ware v. Chew, 43 N. J. Eq. 493. Cf. Robeson v. Pettinger, 1 Gr. Chy. 64. In the first of these cases it was absolutely necessary to the continued use of the property for the purposes to which it was adapted that air and light should pass to the windows over the vacant lot. This fact, however, does not appear in the other two cases, and seems not to have formed an element in the decision. The case of Janes v. Jenkins, 34 Md. 1, seems to look the same way.

In certain of the States it is said that such an easement will not be implied unless there is an absolute necessity, and that, if light and air can be obtained by opening windows elsewhere in the building, an easement will not be implied; Turner v. Thompson, 58 Ga. 268; Powell v. Sims, 5 W. Va. 1; Rennyson's Ap., 94 Penn. St. 147 (semble).

It was suggested in Powell v. Sims that there might be difficulty in determining the *degree* of necessity. Lateral support; every owner of land entitled to have support of adjoining land for his soil. — Every owner of land is entitled to the support of the adjoining land, and to have his land remain in its natural condition, unaffected by any act of his neighbor; and, if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him. Thurston v. Hancock, 12 Mass. 220; Foley v. Wyeth, 2 All. 131; Gilmore v. Driscoll, 122 Mass. 199; White v. Dresser, 135 Mass. 150; McGuire v. Grant, 1 Dutcher 356; Lasala v. Holbrook, 4 Paige 169 (semble); Farrand v. Marshall, 21 Barb. 409; Richardson v. The Vt. Cent. R. R. Co., 25 Vt. 465.

This doctrine of lateral support was vigorously attacked by C. J. Bronson in the case of Radcliff's Ex'rs v. The Mayor of Brooklyn, 4 N. Y. 195; but this dictum was entirely disregarded in Farrand v. Marshall, 21 Barb. 409.

Limited to soil; does not extend to buildings.— This right, however, is limited to the soil in its natural condition, and does not extend to the support of superimposed objects, such as buildings, by which the lateral pressure is increased; Thurston v. Hancock, 12 Mass. 220; Charless v. Rankin, 22 Mo. 566; Panton v. Holland, 17 John. 92; Lasala v. Holbrook, 4 Paige *169; Beard v. Murphy, 37 Vt. 99.

Injury to buildings by excavation actionable if caused by negligence.—If, however, injury to buildings be caused by negligence in excavating, then a recovery for such injury can be had; Shrieve v. Stokes, 8 B. Mon. 453.

No right to support buildings can be gained by prescription.—The right to the support of buildings cannot be acquired by long continued uninterrupted enjoyment of lateral support; Richart v. Scott, 7 Watts 460; Mitchell v. Mayor, etc., of Rome, 49 Ga. 19.

Implied easement for support of buildings.—Is there an implied easement for the support of a building where the owner of two lots with a building upon one sells it and retains the vacant lot or subsequently sells it? There is a dictum in Montgomery v. The Trustees of Masonic Hall, 70 Ga. 38, to the effect that such an easement may be implied. In those jurisdictions where an implied easement in light and air is sustained under similar circumstances, it would seem that an implied easement for the support of buildings may by analogy be sustained.

Watercourses; riparian proprietors entitled to reasonable use of water. — The owners of land on a watercourse are not owners

of the water which flows in it; but each owner is entitled by virtue of his ownership of the soil to the reasonable use of the water as it passes his premises, for domestic and other uses, not inconsistent with a like reasonable use of the stream by all other owners above and below him. Such use is incidental to his right of property in the soil. Any damage caused by such reasonable use is damnum absque injuriâ.

There is no legal right in any proprietor to the flow of all the water in its natural course; Embrey v. Owen, 6 Exch. *353, *368, *369.

Each proprietor entitled to use for domestic purposes.— Each proprietor has the right to use the water for domestic purposes, the watering of cattle, and the like, though such use may diminish the volume of the stream, to the detriment of lower proprietors. It is said in Stein v. Burden, 29 Ala. 127, 132, that he can do this "even though in such use he consume the entire stream."

Each proprietor entitled to use for irrigation. — Each proprietor is entitled to divert from a watercourse water for the purpose of irrigating his land, provided he returns the water so diverted to the channel, so that those lower down can use it. Any loss resulting to the lower proprietors from absorption or evaporation is damnum absque injuriâ. There seems to be some doubt as to the extent of this right, and what constitutes a reasonable use for this purpose; Weston v. Alden, 8 Mass. *136; Colburn v. Richards, 13 Mass. *420.

Right to use for mills. — Each proprietor upon a watercourse has a right to erect thereon a mill, and to use the water necessary to work it, though he thereby diminish the quantity of the stream or obstruct it in its natural flow. His use, however, must be reasonable and necessary for the enjoyment of his own rights; any damage resulting to proprietors lower down the stream will be damnum absque injuriâ; Palmer v. Mulligan, 3 Cai. 307; Platt v. Johnson, 15 John. 213; Bullard v. The Saratoga Victory Mfg. Co., 77 N. Y. 525; Beissell v. Sholl, 4 Dall. 211; Weston v. Alden, 8 Mass. 136; Gould v. Boston Duck Co., 13 Gray 442; Pitts v. The Lancaster Mills, 13 Met. 156; Hartzall v. Sill, 12 Penn. St. 248.

Reasonableness of use a question for the jury. — Whether the use of the water made by a proprietor is reasonable or not is a question of fact, generally to be decided by a jury, in view of all the circumstances; Hetrich v. Deachler, 6 Penn. St. 32;

Hartzall v. Sill, 12 Penn. St. 248; Newhall v. Ireson, 8 Cush. 595; Prentice v. Geiger, 74 N. Y. 341.

Each proprietor entitled to have stream free from pollution.— Each proprietor upon a watercourse is entitled to have the stream flow without being polluted by owners above him, and an action will lie for such pollution; Howell v. McCoy, 3 Rawle 256; Carhart v. The Auburn Gas Light Co., 22 Barb. 297; Merrifield v. Lombard, 13 All. 16; Dwight Printing Co. v. City of Boston, 122 Mass. 583.

Each proprietor entitled to use stream for drainage. — Each proprietor is entitled to the use of a watercourse for the drainage of all surface water which naturally flows into the stream, and, if a lower proprietor obstructs the stream so as to prevent its flow when thus augmented, he is liable; McCormick v. Horan, 81 N. Y. 86. The upper proprietor has an absolute right to this drainage, and can cut sluices or ditches for the purpose, providing he does not thereby concentrate and discharge water in quantities beyond the natural capacity of the stream; Noonan v. City of Albany, 79 N. Y. 470; McCormick v. Horan, 81 N. Y. 86.

Proprietor not entitled to set back water so as to overflow the land or stop the mill of upper proprietor.—If a proprietor, by building a dam, cause the water to flow back upon an upper proprietor's land, or to stop the working of his mill, he is legally liable; Alexander v. Kerr, 2 Rawle 83; Sacrider v. Beers, 10 John. 241; Merritt v. Parker, Coxe 460.

Liable for diversion of stream.— If a proprietor upon a water-course divert the stream, and do not return it so that the lower proprietors can enjoy the use thereof, he is liable; Arnold v. Foot, 12 Wend. 330; Clinton v. Myers, 46 N. Y. 511; Colrick v. Swinburne, 105 N. Y. 503.

Rights may be gained by prescription.— A right to use a stream in an unreasonable manner by diverting it, or unduly obstructing it, or causing it to set back and overflow an upper proprietor's land, or stop the working of his mill, while it cannot be gained by prior occupancy, can be by a continuous exclusive occupancy in substantially unchanged form for twenty years; Bullen v. Runnels, 2 N. H. 255; Tyler v. Wilkinson, 4 Mass. 397; Cowell v. Thayer, 5 Met. 253, 256; Wood v. Kelley, 30 Me. 47; Strickler v. Todd, 10 S. & R. 63; Hoy v. Sterretts, 2 Watts 327.

Actual damage not necessary. - It is unnecessary in cases of

unreasonable or wrongful use of a watercourse to show actual damage, since the mere violation of a legal right is sufficient to give a cause of action; Pastorius v. Fisher, 1 Rawle 27; Alexander v. Kerr, 2 Rawle 83; Ripka v. Sergeant, 7 W. & S. 11; Woodman v. Tufts, 9 N. H. 88; Plumleigh v. Dawson, 1 Gilm. 544.

The rules applicable to surface or subterranean waters not flowing in a distinct channel are different.— The rules already given apply only to watercourses, i. e. streams flowing in definite channels, but not to surface waters or to subterranean waters not flowing in a definite channel.

If the owner of land, by digging in his own soil, thereby prevents subterranean waters from percolating to a neighboring well or stream, and thereby causes damage by diminishing the volume of the well or stream, he is not liable; Greenleaf v. Francis, 18 Pick. 117; Trustees of Village of Delhi v. Youmans, 45 N. Y. 362; Bliss v. Greeley, 45 N. Y. 671; Johnstown Cheese Mfg. Co. v. Veghte, 69 N. Y. 16.

Upper proprietors not entitled to have surface water flow over land of lower proprietor. - The relation of dominant and servient tenements does not, by the common law, apply between adjoining lands of different owners, so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water falling on his land discharged over the land of the lower proprietor, although it naturally finds its way there; and the lower proprietor may lawfully, for the improvement of his estate, and in the course of good husbandry or to make erections thereon, fill up the low places on his land, although, by so doing, he obstructs or prevents surface water from passing thereon from the premises above, to the injury of the upper proprietor; Luther v. The Winnisimmet Co., 9 Cush. 171; Parks v. Newburyport, 10 Gray 28; Dickinson v. Worcester, 7 All. 19; Gannon v. Hargadon, 10 All. 106; Bates v. Smith, 100 Mass. 181; Emery v. City of Lowell, 104 Mass. 13; Swett v. Cutts, 50 N. H. 439; Bowlsby v. Speer, 2 Vroom 351: Barkley v. Wilcox, 86 N. Y. 140; Pettigrew v. Evansville, 25 Wisc. 223 (semble); Hoyt v. The City of Hudson, 27 Wisc. 656; Eulrich v. Richter, 37 Wisc. 226; O'Connor v. The Fond du Lac, Amboy & Peoria R. R. Co., 52 Wisc. 526; Lessard v. Stram, 62 Wisc. 112; Heth v. City of Fond du Lac, 63 Wisc. 228. This rule seems to have been questioned in Iowa, in the

case of Livingston v. McDonald, 21 Iowa 160. The question was left open and considered undecided in Freeburg v. The City of Davenport, 63 Iowa 119, and Drake v. The Chicago, Rock Island & Pacific Ry. Co., 63 Iowa 302; but the rule seems to have been decided in accordance with above authorities in the case of Drake v. The Chicago, Rock Island & Pacific Ry. Co., 70 Iowa 59. The contrary doctrine is maintained in the following authorities: Ogburn v. Connor, 46 Cal. 346; Adams v. Walker, 34 Conn. 466; Gillham v. Madison County R. R. Co., 49 Ill. 484; Gormley v. Sandford, 52 Ill. 158; The Toledo, Wabash & Western R. R. Co. v. Morrison, 71 Ill. 616; The Jacksonville, Northwestern & Southeastern R. R. Co. v. Cox, 91 Ill. 500; Delahoussaye v. Judice, 13 La. Ann. 587; Hays v. Hays, 19 La. [351]; Laumier v. Francis, 23 Mo. 181, 184 (semble); McCormick v. The Kansas City, St. Joseph & Council Bluffs R. R. Co., 70 Mo. 359; Shane v. The Same, 71 Mo. 237; Butler v. Peck, 16 Ohio St. 334 (semble); Tootle v. Clifton, 22 Ohio St. 247; Kauffman v. Griesemer, 26 Penn. St. 407 (semble); Martin v. Riddle, 26 Penn. St. 415, note.

Implied easement for drainage of surface water. — Suppose A. owns two plots of ground, one above the other, and that the surface water from the upper plot naturally flows down over the lower plot; A. sells the upper plot and retains the lower plot. Does the vendee have an implied easement for the surface water from his plot to flow down over the lower plot?

This question, of course, cannot arise in those jurisdictions where it is held that there is an easement for surface water to flow from higher over lower ground. In such jurisdictions the question cannot arise, inasmuch as there is no need of implying an easement, since it is held to exist as a necessary incident to the upper soil.

It is only in jurisdictions where no easement is held to exist that it can arise. We have found no consideration of the question in the authorities. The facts in the case of Luther v. The Winnisimmet Co., 9 Cush., supra, raised the question, but it does not seem to have received the consideration of the court. The decision in the case was adverse to any easement, and we think that it was sound.

No easement for the drainage of surface water from upper to lower ground can be acquired by prescription; Parks v. Newburyport, 10 Gray 28; Rathke v. Gardner, 124 Mass. 14.

BIRKMYR v. DARNELL.

MICH. - 3 ANNE, B. R.

[REPORTED SALKELD, 27.] (a)

A promise to answer for the debt, default, or miscarriage of another for which that other remains liable, must be in writing to satisfy the Statute of Frauds. Contra, where the other does not remain liable.

Declaration. That in consideration the plaintiff would deliver his gelding to A., the defendant promised that A. should redeliver him safe, and evidence was, that the defendant undertook that A. should redeliver him safe: and this was held a collateral undertaking for another; for where the undertaker comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagement; but where the whole credit is given to the undertaker, so that the other party is but as his servant, and there is no remedy against him, this is not a collateral undertaking. But it is otherwise in the principal case, for the plaintiff may maintain detinue upon the bailment against the original hirer, as well as an assumpsit upon the promise against this defendant.

Et per Cur. If two come to a shop (b), and one buys, and the other, to gain him credit, promises the seller, If he does not

⁽a) Mod. Cases, 248. S. C. by name of Bour Kamire v. Darnell.

⁽b) In such a case the question to which of the two was credit given, is generally left to the determination of the jury, who, in deciding it, must take

into their consideration all the circumstances of the case; Keate v. Temple, 1 B. & P. 158; Darnell v. Trott, 1 C. & P. 82; Storr v. Scott, 6 C. & P. 241. If, on production of the plaintiff's books, it appear the defendant was not

pay you, I will, this is a collateral undertaking, and void without writing by the Statute of Frauds. But if he says, Let him have the goods, I will be your paymaster, or I will see you paid (a), this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant.

The fourth section of the Statute of Frauds enacts, that "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The present case turned, as we have just seen, on the meaning of the words, "upon any special promise to answer for the debt, default, or miscarriage of another person;" and the distinction here taken has ever since been held the true one, and is clearly explained, and all the subsequent cases discussed in the notes to Forth v. Stanton, 1 Wms. Saunders, 211, c. n. (1), to which the reader is referred; and where the following rule, which is in substance the very same with that in Birkmyr v. Darnell, is laid down for the purpose of distinguishing between the cases which do and those which do not fall within the statute. "The question is, What is the promise? — is it a promise to answer for the debt, default, or miscarriage of another, for which that other remains liable? - not what the consideration for that promise is: for it is plain that the nature of the consideration cannot affect the terms of the promise itself, unless, as in the case of Goodman v. Chase, 1 B. & A. 297, it be an extinguishment of the liability of the original party." In that case the defendant, in consideration that the plaintiff would discharge A. B., whom he had taken under a capital ad satisfaciendum, promised to pay A. B.'s debt. It was held unnecessary that the promise should be in writing, for the defendant's liability on his promise could not begin till the plaintiff had discharged A. B. out of custody, since that discharge was made a condition precedent; but the moment A. B. was discharged, his liability was at an end, so that the defendant was never liable for a debt of A. B.; the debt had ceased to be due from A. B. before the defendant became liable to pay it. The same point occurred in Butcher v. Stewart, 11 M. & W.

originally debited there, that is strong evidence that he is but a surety, but it is not conclusive. Keate v. Temple, Croft v. Smallwood, 1 Esp. 121. As to the employment of an attorney by a person really interested in the event of a suit, though not a party to the record, see Howes v. Martin, 1 Esp. 162, Noel v. Hart, 8 C. & P. 230.

(a) This form of words can make no difference if the undertaking be really collateral, for in *Matson* v. *Wharam*, 2 T. R. 80, where the words were, "If you do not know him you know me, and *I will see you paid*," the statute was considered to apply.

857. So also in Bird v. Gammon, 3 Bing. N. C. 883, the defendant, in consideration that plaintiff would with Lloyd's other creditors give up their claims against Lloyd, and that Lloyd's farm should be assigned to the defendant, undertook to pay the plaintiff, this was held not to be a promise to pay the debt of a third party, for Lloyd ceased to be liable. (See Good v. Cheeseman, 2 B. & Ad. 328, and the notes to Cumber v. Wane, post.) But where A. as attorney for B. sued C., and it was agreed that the suit should be put an end to, and that C. should pay A. the costs due by B., this was held within the statute, Tomlinson v. Gell, 6 A. & E. 564. Accord. Green v. Cresswell, 10 A. & E. 453, where the rule above cited was approved of by the court, and Thomas v. Cook, 8 B. & C. 728, where it had been stated generally [by Bayley, J.] that promises to indemnify were not within the statute, was reflected upon.

In Eastwood v. Kenyon, 11 A. & E. 446, the Court of Queen's Bench held that the promise would not require a writing if made to the debtor himself, and they expressed an opinion that the statute applies only to promises made to the person to whom another is answerable. This view, which would limit the generality of the rule laid down by [the learned editors of Wms. Saunders], and seems not altogether reconcilable with the doctrine in Green v. Cresswell, supra, has been recognized and acted upon by the Court of Exchequer in Hargreaves v. Parsons, 13 M. & W. 561, where it is laid down, that "the statute applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person towards the promisee." [Accord. Reader v. Kingham, 13 C. B. N. S. 344; S. C. 32 L. J. C. P., where the point is said to have been distinctly settled by previous decisions, and Cripps v. Hartnoll, 32 L. J. Q. B. 381, a case decided in the Exchequer Chamber, where a promise to indemnify against becoming bail in a criminal proceeding was held not to fall within the statute, inasmuch as no debt or legal duty was owing from the person bailed to the promisee, but the court did not feel itself called upon to overrule Green v. Cresswell, the proceedings there having been of a civil nature; and see the observation of Williams, J., in Fitzgerald v. Dressler, 7 C. B. N. S. 385, and Batson v. King, 4 H. & N. 740, in which case Pollock, C. B., expressed an opinion that Green v. Cresswell was erroneously decided. And see, per Malins, V. C., Wildes v. Dudlow, L. R. 19 Eq. 198; 44 L. J. Ch. 341.

It has been thought that it is enough to bring the case within the statute if the contract be made with reference to a supposed future liability of a third person towards the promisee, even though such liability was never in fact created. Mountstephen v. Lakeman, L. R. 5 Q. B. 613; 39 L. J. Q. B. 275. See, however, the judgment of Lord Selborne in the same case in the House of Lords, L. R. 7 H. L. 24. But, as pointed out by Willes, J., in delivering judgment in the Exchequer Chamber, L. R. 7 Q. B. 196, if the supposed liability was the basis of the contract, but never in fact came into existence, the contract would become void by the general law of contract, apart from the question as to whether it was within the statute or not.

It is further laid down in the notes to Forth v. Stanton, that there must be an absence of liability on the part of the promisor himself or his property. Cf. Williams v. Lesser, 3 Burr. 1886. Thus, in Batson v. King, supra, the plaintiff having been compelled, on default of the acceptor, to pay a bill of exchange which he had drawn for the accommodation of the acceptor and the indorser, on the faith of an oral promise to him by the indorser that he should not be called upon to pay the bill, was held entitled to recover the amount from the indorser as money paid to the use of the latter, it appearing that the bill was made, accepted, and indorsed for the purpose of enabling the defendant and the

acceptor to raise money on the security of it for their own use, and that as between them and the plaintiff the latter was surety for them jointly to the party who discounted the bill. So also a promise by a man to pay off an incumbrance on his own property which another is liable to pay is not within the act; thus, if A. sells goods to B. and B. resells them to C., and A. has a lien on the goods for the price payable by B., C.'s promise to A. to pay him in discharge of the lien the amount of the price payable by B. is enforceable although it be not in writing. See Fitzgerald v. Dressler, 7 C. B. N. S. 374.] The statute does not apply to the contract by a del credere agent with his principal, which need not, therefore, be in writing, Couturier v. Hastie, 8 Exch. 40. [Wickham v. Wickham, 2 Kay & J. 478, 486, per Kindersley, V. C. It does apply to an agreement to give a guarantee, Mallett v. Bateman, 16 C. B. N. S. 530; 35 L. J. C. P. 40 in Cam. Scace.; L. R. 1 C. P. 163.]

When it is settled that the promise is one to answer for the debt, default, or miscarriage of another, within the meaning of the statute; or, to use Lord Holt's expression in the text, that it is a collateral, not an original promise; the next question that occurs is, what must, in order to satisfy the act, appear in the writing thereby required? Now, the act in terms requires that the agreement, or some memorandum or note thereof, shall be in writing; and it [was] held that the word agreement comprehends both a consideration and a promise; and that both these must, therefore, appear in the writing. This was determined in the celebrated case of Wain v. Waviters, 5 East, 10, [which, though] frequently doubted, was at last confirmed by Saunders v. Wakefield, 4 B. & A. 596.

[But in consequence of the difficulty of setting forth the consideration in a sufficient manner to satisfy the courts of law, this rule proved to be a grievance to the mercantile community, and therefore, after having been in force for more than half a century, it was at last rescinded by the "Mercantile Law Amendment Act, 1856" (19 & 20 Vict. c. 97), the 3d section of which enacts, that no special promise to be made by any person after the passing of that act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document. This enactment. therefore, extends to cases within the second branch of the 4th section of the Statute of Frauds (see, however, per Bramwell, B., Wynne v. Hughes, 21 W. R. Exch. 629) the rule which had been already applied to the 17th section, namely, that it is sufficient if the promise of the party to be charged appears in the writing. See Egerton v. Matthews, 6 East, 307.

The statute does not, it must be observed, exempt guarantees from the application to them of the ordinary rules of evidence with reference to written instruments, except in so far as it allows the term constituting the consideration to be added by parol. By the ordinary rules of evidence proof of the actual consideration is admissible] in cases of patent ambiguity, where the language of the instrument renders it uncertain as to which of two or more matters severally mentioned therein was the consideration upon which it was given. [If the instrument states that to be the consideration for the promise, which in law is no consideration, and a consideration cannot be collected from the rest of the instrument (Oldershaw v. King, 2 H. & N. 517), or if, looking only to the terms of the instrument, it appears that no consideration was given, or if the consideration is misstated, in none of these cases does the recent act profess to affect the rule, that the terms of a written instrument cannot be varied by parol.

If the whole of the *promise* does not sufficiently appear in writing, parol evidence of the consideration is not admissible to supply the defect. This later point was decided by *Holmes* v. *Mitchell*, 7 C. B. N. S. 361. There the defendant had by word of mouth advised the plaintiff (assuring him that he would run no risk) to lend 400l. to Spooner and Cubitt on mortgage of certain premises, and the defendant, having consulted Lyne (his solicitor), addressed the following letter to the plaintiff:—

"Dear Charles,

"I saw Mr. Lyne this morning, and I told him he had better call on you, as he seemed very ancious to have the mortgage completed, and I thought he offered very fair; but do as you please about it. I will undertake any responsibility myself respecting it, should there be any.

"W. Mitchell."

Shortly afterwards the plaintiff, acting on the faith of this letter, lent the 400l. on the mortgage, and thereby suffered a considerable loss. Thereupon he sued the defendant as on a guaranty, founding his declaration on the promise contained in the defendant's letter. Under these circumstances the court held that the action would not lie. "At the time the letter was written," said Byles, J., delivering the judgment of the court, "no mortgage existed. The letter is silent as to the sum to be advanced, as to the nature of the security, whether a mortgage in fee or for years, and as to the land to be charged. The letter, if read by itself, without reference to any previous conversations, would be a promise to be responsible for any sum of money, however large, at any rate of interest, secured by any kind of mortgage, on any land, with any title. That, however, would be an unreasonable construction, and is not its true meaning; it evidently refers to previous conversations in which those particulars were supplied. The whole promise, therefore, is not in writing, as the statute requires that it should be. It cannot be made out without reference to previous conversations. In Shortrede v. Cheek, 1 A. & E. 57; 3 N. & M. 866; and in Bateman v. Phillips, 15 East, 272; an existing document or an existing debt was referred to in the writing, so that evidence of oral statements was not necessary to explain the promise. The recent statute 19 & 20 Vict. c. 97, s. 3, it is true, abrogates the rule laid down in Wain v. Warlters, 5 East, 17, and enables a party to give parol evidence of the consideration for a guarantee. But a consideration expressed in writing formerly discharged two offices: it sustained the promise, and might also explain it. Now, however, parol evidence, though it may supply the consideration, cannot go further, and explain the promise."

In order to determine whether the promise sufficiently appears in writing, recourse must still be frequently had to the authorities decided upon the questions relating to the sufficiency of the statement of the consideration, for many of these cases were decided upon grounds which would have been equally applicable had the questions turned on the sufficiency of the statement of the promise. Thus it will be sufficient (as has been held in regard to the consideration) if the promise] can be gathered by fair intendment from the whole tenor of the writing, not that a mere conjecture, however plausible, would be sufficient to satisfy the statute, but there must be a well grounded inference to be necessarily collected from the terms of the memorandum. See the judgments of Tindal, C. J., in Hawes v. Armstrong, and of Patterson, J., in James v. Williams, 5 B. & Ad. 1109; Bentham v. Cooper, 5 M. & W. 628; and Jarris v. Wilkins, 7 M. & W. 410. In Shortrede v. Cheek, supra, where a guaranty was expressed to be in consideration that the plaintiff "would withdraw the promissory note," the Court of King's Bench held that it was sufficiently certain, and that parol evi-

dence was admissible to show what promissory note was meant. [And the promise having been to pay the promissory note, the parol evidence was as much required to apply the promise as the consideration. In *Bateman v. Phillips, supra*, the plaintiff was on the point of suing David Williams for a debt, when his attorney received this letter signed by the defendant:—

" Sir,

"The bearer, David Williams, has a sum of money to receive from a client of mine next week, and I trust you will give him indulyence till that day, when I undertake to see you paid."

The debt of Williams, which was the subject-matter both of the consideration and promise, having been identified by parol evidence, the letter was held sufficient memorandum within the statute. The above two cases are illustrations of the general rule that parol evidence is admissible to identify the subject-matter of a written instrument. See also Macdonald v. Longbottom, 1 E. & E. 977; 29 L. J. Q. B. 256; Mumford v. Gething, 7 C. B. N. S. 305. So also where alterations have been made after signature, parol evidence is admissible to show that they have been assented to, since this is not to vary a written contract, but to show what was in fact the contract by which the parties agreed to be bound, Stewart v. Eddowes, L. R. 9 C. P. 311.]

Parol evidence is admissible, as in the case of a will or other written instrument, not to alter or vary the meaning of such guaranty, but to interpret or explain it; not to make that appear to be a consideration which upon the face of the guaranty appears not to be so; but either (as in *Shortrede* v. *Cheek*) to fix the particular subject-matter to which the guaranty relates, or even to show, by reference to time or other circumstances, that matter indicated by the guaranty, but which, as described therein, may be a good, and does not appear to be a bad, is, by reason of such circumstances, in fact a good consideration. Thus in *Haigh* v. *Brooks*, 10 A. & E. 309, parol evidence was holden admissible to show that in a guaranty worded —

"In consideration of your being in advance to L. in the sum of £10,000, for the purchase of cotton, I do hereby give you my guaranty for that amount, on their behalf"—future advances were referred to, and so that it was valid. And in Goldshede v. Swan, 1 Exch. 154, a guaranty as follows—

"In consideration of your having this day advanced to our client, Mr. S. D., £750, secured, &c., we hereby jointly and severally undertake, &c." — was held to be "sufficiently ambiguous" — (that is, not ambiguous as to what was the matter intended to be the consideration, for that was sufficiently identified, but as to whether that matter, when its circumstances were ascertained, would furnish a sufficient consideration in point of law) — to admit of evidence to show that the advance was not a past one, but made simultaneously with the execution of the guaranty; and a declaration stating the promise to have been made in con-, sideration that the plaintiff "would" lend, &c., was sustained. In each of those cases the subject-matter of the consideration was identified by the writing, and its circumstances only added by parol, which being ascertained there was no longer any doubt, that that which by the writing itself appeared to be the consideration was a valid consideration in point of law. But in Price v. Richardson, 15 M. & W. 539, supra, it was doubtful, upon the face of the guaranty, whether the consideration was the supply of the leather, or forbearance until the 6th of December. [See also Hoad v. Grace, 7 H. & N. 494; 31 L. J. Exch. 98 (where "goods supplied" was construed to mean goods to be supplied), and the observations of Williams, J., in Way v. Hearn, 13 C. B. N. S. 305.]

In Raikes v. Todd, 8 A. & E. 846, a guaranty thus —

"Oct. 19th, 1832. — I undertake to secure to you the payment of any sums you have advanced, or may hereafter advance to D., on his account with you commencing 1st Nov. 1831, not exceeding £2000" - was considered invalid on the ground that it was doubtful whether the consideration consisted of forbearance to sue for the past advances, or partly that and partly the making of further advances, and the court decided that, at all events, it did not sustain a declaration alleging the advances to be the consideration. There can, however, be no doubt that, as suggested by Parke, B., in Kennaway v. Treleaven, 5 M. 498, the future advances would form a sufficient consideration for a guaranty of their own amount, and also of the past advances; and accordingly in Johnstone v. Nicholls, 1 C. B. 251, and Chapman v. Sutton, 2 C. B. 634, guaranties of past and future debts given in consideration of a continuance of dealings with the principal debtor were sustained. Semple v. Pink, 1 Exch. 74, which decided that forbearance to sue was not a sufficient consideration to support a guarantee. must be considered as overruled by Oldershaw v. King, 2 H. & N. 517; see Coles v. Pack, L. R. 5 C. P. 65, 39 L. J. C. P. 63. Wynne v. Hughes, 21 W. R. 628. Miles v. New Zealand, &c., Co., 32 Ch. D. 266.

In construing a guarantee, the surrounding circumstances should be looked to. Heffield v. Meadows, L. R. 4 C. P. 595; Laurie v. Scholefield, L. R. 4 C. P. 622; 35 L. J. C. P. 290; Newell v. Radford, L. R. 3 C. P. 52; Coles v. Pack, L. R. 5 C. P. 65; 39 L. J. C. P. 63; Morrell v. Cowan, 7 Ch. D. 151; 47 L. J. Ch. 73; and in certain cases the rule ut res magis valeat quam pereat will be applied. Thus in Broom v. Batchelor, 1 H. & N. 255, the agreement between the plaintiff and defendant was as follows: -- "In consideration of the credit given by Mr. S. Broom to Mr. J. Edge, I (the defendant) hereby guarantee the payment of all bills of exchange drawn by the said S. B., and accepted by the said J. Edge. Also I hereby agree to guarantee the payment of any balance that may be due from the said J. Edge to the said S. Broom. This guarantee to include all bills of exchange now running, as well as the balance of account due;" and it was held that the writing extended to future transactions, and was sufficient to support an action on a promise to answer for the default of Edge in respect of a bill accepted by him after the date of the agreement. And see Oldershaw v. King, Cam. Scacc. 2 H. & N. 517, in which case a promise to forbear to press for immediate payment was deemed a good consideration.]

Provided that the agreement [or promise] be reduced to writing according to the above rules, it matters not out of how many different papers it is to be collected, so long as they can be sufficiently connected in sense. Jackson v. Lowe, 1 Bing. 9; Phillimore v. Barry, 1 Camp. 513. See Johnson v. Dodgson, 2 M. & W. 653; Hammersley v. Baron de Biel, 12 Cl. & F. 45 [Ridgway v. Wharton, 6 H. L. C. 238; Long v. Millar, 4 C. P. D. 450]. But this connection in sense must appear upon the documents themselves, for parol evidence is not admissible for the purpose of connecting them.

That was one of the principal points decided in Boydell v. Drummond, 11 East, 142, which arose upon this section of the act, although the instrument there sued upon was not a guaranty. In that case the plaintiff proposed to publish a magnificent edition of Shakspeare, illustrated by seventy-two engravings, which were to come out in numbers, at three guineas per number, two of which were to be paid in advance; each number was to contain four engravings; "one number at least was to be published annually, and the proprietors were confident that they should be able to produce two numbers in the course of every year." These proposals were printed in a prospectus, and lay in the plaintiff's shop. The plaintiff also kept a book, which had for its title "Shakspeare subscribers, their signatures:" but did not refer to the prospectus. The defendant,

determining to become a subscriber to the work, signed his name in the book containing the list of subscribers, but afterwards refusing to continue to take it in, though he had received and paid for some few numbers, this action was brought against him to compel him to complete his contract. The court decided, 1st, That the agreement was one not to be performed within the space of a year from the making thereof; that it was therefore within the 4th section of the Statute of Frauds, and it was necessary that there should be a note or memorandum of it in writing, signed by the defendant. See the notes to Peter v. Compton, post, p. 359. 2dly, They held that though the prospectus contained the terms of the agreement, and would be sufficient memorandum thereof if it could be coupled with the book in which the defendant signed his name; still, as it contained no reference to the book, nor the book to it, there was no connection in sense between them which would enable the court to couple them together and treat them as one document. And 3dly, they held that such connection could not be introduced by parol evidence, but must, in order to satisfy the statute, appear upon the face of the documents themselves. [And see the judgment of Williams, J., in Peek v. North Staffordshire Rail. Co., E. B. & E. 997; and S. C. in Dom. Proc. 32 L. J. Q. B. 241; and Fitzmaurice v. Bayley, 9 H. of L. 78; Wilkinson v. Evans, L. R. 1 C. P. 407; Crane v. Powell, L. R. 4 C. P. 123; 38 L. J. C. P. 43, per Willes, J.; Peirce v. Corf, L. R. 9 Q. B. 216; Nene Valley Drainage Company v. Dunkley, 4 Ch. D. 1; Kronheim v. Johnson, 7 Ch. D. 60; 47 L. J. Ch. 132; Cave v. Hastings, 7 Q. B. D. 125; 50 L. J. Q. B. 575; Studds v. Watson, 28 Ch. D. 305.] They also held that the part performance which had taken place made no difference. [See on this point, Maddison v. Alderson, 8 App. Ca. 467, and the note to Peter v. Compton, post.]

It does not signify to whom the memorandum containing the agreement is addressed: it may be contained in a letter to a third person. Per Lord Hardwicke, 3 Atk. 503; 2 Cha. Rep. 147; 1 Vernon, 110; Bateman v. Phillips, 15 East, 272; Longfellow v. Williams, Peake's Add. Ca. 225. [Gibson v. Holland, L. R. 1 C. P. 1; 35 L. J. C. P. 5. It may be merely an offer acted upon. Powers v. Fowler, 4 E. & B. 511; Smith v. Neale, 2 C. B. N. S. 67; and see Peek v. North Staffordshire Rail. Co., supra; Holmes v. Mitchell, supra, p. 339; Shadwell v. Shadwell, 9 C. B. N. S. 159; 30 L. J. C. P. 145; Forster v. Rowland, 7 H. & N. 103; 30 L. J. Exch. 396.] The reason of this is, that the memorandum is necessary only to evidence the contract, not to constitute it. The contract, as was observed by Tindal, C. J., in Laythoarp v. Bryant, 2 Bing. N. C. 744, is made before any signature thereof by the parties. It is upon this ground that the case of Leroux v. Brown, 12 C. B. 801, in which it was held that a contract within the statute, though made abroad, must be in writing, professes to be founded - quære. [The names or description of both of the parties to the agreement must appear in the memorandum, Williams v. Lake, 29 L. J. Q. B. 1; Vandenbergh v. Spooner, L. R. 1 Ex. 316; 35 L. J. Ex. 201; Newell v. Radford, L. R. 3 C. P. 52; 37 L. J. C. P. 1; Re Hudson, 54 L. J. Ch. 811. There must be a sufficient identification of the property dealt with in the document or documents constituting the memorandum: Shardlow v. Cotterell, 20 Ch. D. 90; 51 L. J. Ch. 353. In Warner v. Willington, 3 Drew. 525; 25 L. J. Ch. 662, Kindersley, V. C., was of opinion that the omission of the lessor's name in a memorandum of agreement for a lease was supplied by a subsequent letter referring to that memorandum, and showing who the intended lessor was. In Rossiter v. Miller, 5 Ch. D. 648; 46 L. J. Ch. 228, affirmed on this point in the H. L. 3 App. Cas. 1124, the word proprietors was held a sufficient identification of the vendors in a contract of sale. In Marshall v. Berridge, 19 Ch. D. 233, 51 L. J. Ch. 329, it was held, overruling Jaques v. Millar, 6 Ch. D. 153, that an agreement for a lease not stating the day from which the term was to commence did not satisfy the statute; and see May v. Thompson, 20 Ch. D. 705, 51 L. J. Ch. 917; compare Phelan v. Tedcastle, 15 L. R. Ir. 169.

As to writings not intended to contain the whole terms of the agreement, see Harris v. Richetts, 4 H. & N. 1; 28 L. J. Exch. 197, or to operate unless signed by both parties, Herbert v. Treherne, 3 M. & G. 755; Furness v. Meek, 27 L. J. Exch. 34; Catling v. King, 5 Ch. D. 660; 46 L. J. Ch. 384; and see Heyworth v. Knight, 17 C. B. N. S. 298; 33 L. J. C. P. 298, where writings contemplating the drawing up of a formal contract were sufficient evidence of the contract, the formal document having been so framed as not to be binding; Rossiter v. Miller, ubi. sup.; and Bonnewill v. Jenkins, 8 Ch. D. 70.]

With respect to the signature, it is only necessary that the memorandum should be signed by the party against whom it is sought to enforce the contract, Laythoarp v. Bryant, 2 Bing. N. C. 744 [The Liverpool Borough Bank v. Eccles, 4 H. & N. 139]. See Aveline v. Whisson, 4 M. & G. 801; Cooch v. Goodman, 2 Q. B. 580 [Caton v. Caton, L. R. 2 H. L. 127; 36 L. J. Ch. 886]. It was objected in Laythourp v. Bryant, which case arose on a contract to sell lands, that unless the agreement were signed by both parties, there would be a want of mutuality, as the party who signed would be bound, and the party who had not signed would be loose, and so that there would be no consideration for his agreement. "But," said the Lord Chief Justice, "whose fault is that? The defendant might have required the plaintiff's signature, but the object of the statute was to secure the defendant's. The preamble runs, 'for prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury;' and the whole object of the legislature is answered when we put this construction on the statute. Here, when this party who has signed is the party to be charged, he cannot be subject to any fraud. And there has been a little confusion in the argument between the consideration of an agreement and mutuality of claims. It is true the consideration must appear upon the face of the agreement. Wain v. Warlters was decided on the express ground that an agreement under the fourth section imports more than a bargain under the seventeenth; but I find no case nor any reason for saying that the signature of both parties is that which makes the agreement. The agreement is in truth made before any signature." [Indeed this doctrine has been carried to its extreme limit in those cases, old and new, where a signed proposal of a contract assented to by parol has been held sufficient as a memorandum to bind the party proposing. See Smith v. Neale, 2 C. B. N. S. 67, 26 L. J. C. P. 143. The cases are collected in Reuss v. Picksley, in Cam. Scacc.; L. R. 1 Ex. 342; 35 L. J. Exch. 218. See as to acceptance by telegram, Godwin v. Francis, L. R. 5 C. P. 295; 39 L. J. C. P. 121. Semble the signing instructions for a message which is transmitted by the company and delivered on a form with the names of sender and receiver written by the company's clerk is a sufficient signature to bind the sender within the statute. Ibid.

Where alterations made in a written contract after it had been signed by the defendant were subsequently assented to by him, the contract was held binding, and parol evidence was admitted to show that he had assented to the alterations. Stewart v. Eddowes, L. R. 9 C. P. 311. In like manner where there is a written memorandum of the contract, parol evidence is admissible after performance, to show that the party to be charged has assented to a substituted mode of performance, Leather Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140; 44 L. J. Q. B. 54. Where in the case of a written contract for the delivery of iron above the value of £10, there had been a parol assent by the vendor at the request of the buyer to suspend delivery; in an action by the seller on the original contract it

was held that such assent did not create a substituted contract, and that the action was therefore maintainable, but that the damages were to be estimated by the market price at the date of the last request to withhold delivery, Hickman v. Haynes, L. R. 10 C. P. 598; 44 L. J. C. P. 358. Secus where the parol alteration was held to create a substituted contract, Plevins v. Downing, 1 C. P. 1). 320; 45 L. J. C. P. 695.

It is of course possible that the agreement may be so framed as not to be binding, unless both parties have signed; as where one signs on condition that the terms of the writing are not to be obligatory unless the other signs. See Furness v. Meek, 27 L. J. Exch. 34. Deeds are not affected by the Statute of Frauds, see Cherry v. Hemming, 4 Exch. 631; Holmes v. Mitchell, supra, p. 339, per Willes, J. As to signatures by auctioneers and factors, see Purton app., Crofts resp., 16 C. B. N. S. 11; 33 L. J. C. P. 189; Durrell v. Evans, 6 H. & N. 660; 30 L. J. Exch. 254. As regards the place of the signature, though it is not necessary that it should appear in any particular part of the written instrument, it should be so introduced as to govern and authenticate every material or operative part of it. Caton v. Caton, L. R. 2 H. L. 127; 36 L. J. Ch. 886, and see Jones v. Victoria Graving Dock Co., 2 Q. B. D. 314; 46 L. J. Q. B. 219; Kronheim v. Johnson, 7 Ch. D. 60; 47 L. J. Ch. 132.]

The words attributed in the text of the principal case to the court, who are made to say that a collateral undertaking is void without writing, by the Statute of Frauds, are too strong, if literally understood; for the act does not direct that the promise shall be void, but that "no action shall be brought" upon it; and Bosanquet, J., remarks, in Laythoarp v. Bryant, that the seventeenth section is in this respect stronger than the fourth, for the seventeenth avoids contracts not made in the manner there prescribed [that is to say, makes them void so long as they remain unwritten, see Bailey v. Sweeting, post, p. 350]. Accordingly, though no action can be brought upon a parol guaranty, the courts have been known to enforce one against an attorney, by virtue of their summary jurisdiction over their own officers, see Evans v. Duncan, 1 Tyrwh. 283; Senior v. Butt; and Payne v. Johnson, there cited. And this jurisdiction was asserted by Coleridge, J., In re Hilliard, 2 D. & L. 919.

It is hardly necessary to add, that an agreement invalid for want of writing to satisfy the statute has no tinge of illegality, and may be given in evidence with the same effect as any other promise binding in honor and conscience, though not in law; for instance, in Cresswell v. Wood, 10 A. & E. 460, where A. drew a bill of exchange on B., who accepted it, and A. discounted it, and applied the money in liquidation of a demand on C., made on him as surety for the debt of D., against which A. had promised to indemnify him, the agreement to indemnify, although by parol (being in fact the same which had in Green v. Cresswell been held to require a writing), was allowed to be given in evidence on behalf of B., for the purpose of supporting a plea that the bill was for A.'s own accommodation. And in Sweet v. Lee, 4 Scott N. R. 77 [3 M, & G, 452], a memorandum by which an annuity was payable by the plaintiff to the defendant having been put in suit by the plaintiff, and appearing to be invalid for want of stating a consideration, the plaintiff sought to recover, as upon a failure of consideration, payments which he had made for several years on account of the annuity; but the Court of Common Pleas distinguished the case from those in which the contract is one that the law has declared to be void, Tindal, C. J., saying, "The contract is not void; there is simply a failure of evidence;" and they held that the plaintiff was neither entitled to damages upon the contract, nor to recover back the payments made under it as upon a failure of consideration [and see Thomas v. Brown, 1 Q. B. D. 714].

However, it is not necessary, in order that the statute should apply, that the action should be brought on the agreement; it is enough if the effect of the action is to "charge" the defendant by means of the agreement. Thus in Carrington v. Roots, 2 M. & W. 248, recognized in Reade v. Lamb, 6 Exch. 130, trespass for asportavit of a cart, plea removal of it damage feasant, replication that defendant had sold a crop of grass to plaintiff with liberty to take it, quare, etc., traverse of agreement; parol evidence of such a sale was held inadmissible, and plaintiff non-suited. And where a question arises between either of the contracting parties and a stranger, whether a contract has passed an interest in services or other property, the stranger may, equally with a party to the contract, insist upon the statute. Thus, where a contract of service is void, as between the parties to it, for want of a writing to satisfy the statute, the master can maintain no action for enticing away the servant, Sykes v. Dixon, 9 A. & E. 693 [nor can he proceed criminally under the Master and Servant Act, 1867, Banks v. Crossland, L. R. 10 Q. B. 97; 44 L. J. M. C. 8]; and a vendee cannot, where the contract of sale is invalid by the statute, effect an insurance upon the goods, Stockdale v. Dunlop, 6 M. & W. 224; nor, it seems, could be bring an action against the carrier, treating the vendor as his agent to forward, see Coates v. Chaplin, 3 Q. B. 483 [Coombs v. Bristol and Exeter Railway Co., 3 H. & N. 510; nor trover for a conversion of the goods by a stranger after the making of the actual contract and before the reduction of its terms to writing, Felthouse v. Bindley, 31 L. J. C. P. 204].

Also it is observable that the written memorandum must exist before action, and in that respect differs from mere evidence. Bill v. Bament, 9 M. & W. 36; see Fricken v. Tomlinson, 1 M. & G. 773. [And it must be a memorandum of an agreement which was complete at the time of the memorandum, therefore a letter containing and referring to a draft conveyance in which an agreement to purchase certain land was recited was held insufficient; Munday v. Asprey, 13 Ch. D. 855; 49 L. J. Ch. 216.] And, indeed, attending to the distinction pointed out by the Lord Chancellor Cottenham in Dale v. Hamilton, 2 Phillips, 266, between agreements and declarations of trust; "that, in the one it is the agreement itself, which is the origin of the interest, that must be in writing; in the case of a declaration of trust, which is only the recognition of a preexisting interest, it is the evidence and recognition, and not the origin of the transaction, that must be in writing," it may be found difficult to impute any retroactive effect to the subsequent written memorandum of an agreement within the statute, not originally reduced into writing.

[This difficulty arose in the case of Bailey v. Sweeting, 9 C. B. N. S. 843; 30 L. J. C. P. 150. That was an action brought to recover the price of some chimney-glasses, and also some other goods, as to which, however, no question arose. The declaration was for goods bargained and sold, it was therefore necessary to prove that the property vested in the defendant. The bargain was oral, and was intended to pass the property immediately. The plaintiff was to send the glasses by a carrier, and the defendant to pay the carriage. The goods were sent, but were damaged in the carriage, and the defendant on that account refused to receive or pay for them. More than four months afterwards the plaintiff applied to the defendant for payment of the price of the glasses, and also of the other goods. In answer the defendant wrote, saying, that "the only parcel selected for ready money was the chimney-glasses, amounting to 38l. 10s. 6d., which goods I have never received, and have long since declined to have for reasons made known to you at the time." The defendant then went on to say, with regard to the other goods, that he would pay for them at once if allowed discount. The question was whether this letter took the case out of the Statute

of Frauds. On behalf of the defendant it was urged that a retroactive effect could not be given to the letter, that the parol repudiation of liability had already put an end to the contract, and that the letter was not a sufficient note or memorandum, because on the face of it it was written for the purpose of disclaiming liability under the contract. The court decided that the letter was a sufficient memorandum. "The effect," said Williams, J., "of the 17th section of the Statute of Frauds is that though there is a valid verbal contract, it is not actionable unless something of several things has happened, one of which is the existence of a note or memorandum in writing signed by the party to be charged. As soon as that occurs, the contract, though not previously actionable, becomes actionable, and the question, therefore, is, whether, in the present case, there exists such a memorandum as the statute refers to. It appears to me that there does. The letter of the defendant refers to all the essential terms of the bargain; and the only question is, whether it is less sufficient, because it is accompanied by a statement that the defendant does not consider himself liable for the loss arising from the default of the carrier. I do not consider that it is so. It is said that there is a difficulty in maintaining such a doctrine from the inconvenience which may arise from the property not passing until the contract becomes an actionable contract. That may be so, but the same objection would apply to the case of part payment or part acceptance, and no one doubts that a verbal contract may be set up where these have afterwards occurred. . . . I do not think that the question whether the party writing the letter had a right to put an end to the contract could affect the question whether there was or was not a good contract. The intention of such party to abandon or not the contract can have nothing to do with the question whether there is a sufficient memorandum or not of the contract." Accord. Gibson v. Holland, L. R. 1 C. P. 1; 35 L. J. C. P. 35, where Willes, J., is reported to have said, "The memorandum need not have the character of a contract. The section applies to evidence only;" and see Forster v. Rowland, 7 H. & N. 103; 30 L. J. Exch. 396, where Bailey v. Sweeting was distinguished; Wilkinson v. Evans, L. R. 1 C. P. 407; 35 L. J. C. P. 224; Buxton v. Rust, L. R. 7 Exch. 1, 279; 41 L. J. Exch. 1, 173.7

"By the established construction of this clause" (29 Car. II. c. 3, § 4, cl. 2), "'a special promise,' in order to fall within the statute, must be express and not merely implied by law, 'to answer for a debt' for which the promisor's person or estate is not already liable, 'of another' than either of the parties to the promise, and who, if already liable for the debt, continues so liable." Gray, J., in Furbish v. Goodnow, 98 Mass. 296.

1. Special promise.

By the express terms of the statute the liability of the defendant must be founded upon a *promise*. After it was decided in Pasley v. Freeman, 3 T. R. 51, that an action on the case would lie for false and fraudulent representations as to the credit or character of a third person, the ques-

tion soon came up for adjudication whether such verbal representations were within the statute of frauds, and the English court determined that they were not; Eyre v. Dunsford, 1 East 318; and the rulings of the American courts are uniformly in accord. See Patten v. Gurney, 17 Mass. 182; Benton v. Pratt, 2 Wend. 385; Wise v. Wilcox, 1 Day 22; Ewins v. Calhoun, 7 Vt. 79; Warren v. Barker, 2 Duv. (Ky.) 155. Lord Eldon, however, in Evans v. Bicknell, 6 Ves. 173, deprecated this narrow construction, as opposed to the spirit and intent of the enactment, and as letting in the very mischiefs intended to be prevented thereby; and before many years a remedial statute was passed in England requiring a memorandum in writing of such verbal representations; Lord Tenterden's Act, 9 Geo. IV. c. 14, § 6. In this country, Maine, Vermont, Massachusetts, Virginia, West Virginia, Alabama, Kentucky, Indiana, Missouri, Michigan, Oregon, and Wyoming have adopted similar legislation. Lord Tenterden's Act and the like statutory provisions in this country have been strictly construed by the courts. Thus in Norton v. Huxley, 13 Gray 285, it was held that verbal representations, falsely and fraudulently made to a sub-contractor, that there would be no risk in his undertaking the work, and that the defendant had funds of the contractor in his possession, were not within the statute. In Daniel v. Robinson, S. C. Mich. Nov. 3, 1887, the facts were substantially the same as in the case just cited, except that the fraudulent representations were coupled with a promise to guarantee the third party's debt, and it was nevertheless held that an action would lie for the verbal misrepresentations. See Hamar v. Alexander, 2 Bos. & P. N. R. 241, where the question arose, before the passage of Lord Tenterden's Act, as to the effect of fraudulent misrepresentations as to the credit of a third party being coupled with a promise to answer for the debt. See also Gallager v. Brunel, 6 Cow. 346; Adams v. Anderson, 4 Harr. & J. 558. If the substantial foundation of the action be the fraudulent misrepresentations of the defendant as to a third party's credit, the statute will apply, whatever the form of action adopted; Haslock v. Fergusson, 7 Ad. & E. 86; Hunter v. Randall, 62 Me. 423. It is held that such oral representations are invalid as a ground of action, although the defendant's object in procuring credit for the third party was primarily to benefit himself; Kimball v. Comstock, 14 Gray 508; Wells v. Prince, 15 Gray 562; McKinney v. Whiting, 8 Allen 207. It has been held in Massachusetts that verbal fraudulent representations as to the value of an estate of a third party, which the plaintiff was thereby induced to buy, were not within the statute; Medbury v. Watson, 6 Met. 246. This question as to whether Lord Tenterden's Act embraces specific representations as to the state of a certain portion of the third party's property is one of considerable difficulty. See Lyde v. Barnard, Tyrw. & G. 250; Swann v. Phillips, 8 Ad. & E. 457.

In Belcher v. Costello, 122 Mass. 189 (1877), it was decided that representations as to the credit of the maker of a note transferred by a debtor to his creditor as collateral security for a precedent debt were not within the statute, because the representations were not made for the purpose of obtaining credit for the debtor. But in Mann v. Blanchard, 2 Allen 386, it was held that an action could not be maintained upon oral representations by the holder of a note as to the solvency of the maker thereof, made to the plaintiff for the purpose of securing his indorsement on the instrument, in order to procure its discount for his own use. Representations by an agent or officer of a corporation as to its financial standing or ability are, of course, within the statute; Wells v. Prince, 15 Gray 562; McKinney v. Whiting, 8 Allen 207.

It must be a special promise. — To come within the terms of the statute of frauds, there must be a special promise. The word "special" has been interpreted as meaning merely a promise in fact, as opposed to a promise raised by implication of law. Per Hosmer, C. J., in Sage v. Wilcox, 6 Conn. 81; Allen v. Pryor, 3 A. K. Marsh. 305; Pike v. Brown, 7 Cush. 133, per Shaw, C. J.; Goodwin v. Gilbert, 9 Mass. 510. Mr. Browne, in his excellent treatise, has classed under the head of implied promises that important line of cases which hold that an oral promise to pay the debt of a third party, made by the defendant to the third party, usually in consideration of the transfer of property to him, may be enforced by the creditor. It seems to us better to treat these cases under the "funds" rule, since every proper application of the above principle would seem to be embraced by that rule, and the principle itself, if carried out to its full extent, would result in allowing the creditor to enforce an oral promise made to the debtor for his benefit,

which it would be impossible for him to enforce if made to himself. See *infra*, under the "funds" rule.

2. "Answer for."

In order that the statute shall apply, the defendant's promise must be to discharge the liability of the third person, and not merely to perform some act tending to such discharge, although the damages for the breach would be measured by the amount of the third party's debt; Elkins v. Heart, FitzG. 202; Jarmain v. Algar, 2 C. & P. 249. As has been said, a mere convergence of the two promises will not be sufficient. It is necessary that they should be substantially for the performance of the same thing, the discharge of the third party's liability, and the true test seems to be, whether this liability will be discharged by the fulfilment of the defendant's promise. Thus in Towne v. Grover, 9 Pick. 306, it was held that a promise not to pay over funds of the third party before giving notice to the plaintiff, for the purpose of enabling him to serve a trustee process, was not within the statute; so as to a promise by one who has receipted for attached property, that it shall be returned upon demand; Marion v. Faxon, 20 Conn. 486. See also Tindal v. Touchberry, 3 Strobh. (S. C.) Law 177; Palmer v. Witcherly, 15 Neb. 98 (1883). In the last case the two promises were for entirely different things, the one to pay the rent of a store, the other to pay the price of it; hence the statute was held not to apply.

Promise to procure a third person as guarantor.—In Bushell v. Beavan, 1 Bing. N. C. 103, it was decided on this principle that an oral promise to obtain the signature of a stranger to a written guaranty was not within the statute; but the case has been criticised as proceeding upon too narrow grounds, since the ultimate result of the defendant's promise was to secure the liability of the principal debtor. But in the celebrated case of D'Wolf v. Rabaud, 1 Pet. (U. S.) 476, where the collateral promise was to deliver goods, Mr. Justice Story says that such a promise is not within the statute, though the purpose of the promise was to discharge a third person's indebtedness.

Purchase of a debt.—Upon this general ground, also, rested the decision in Anstey v. Marden, 4 B. & P. 124, where it was held that a promise to purchase the debt of another was not within the statute, since, from the very nature of the transaction, the debtor's liability was not to be discharged, but to be kept alive for the benefit of the purchaser. Some courts, however, are inclined to give a liberal construction to the statute in this respect, and decline to except a promise from its operation, because it has only indirectly the effect of making the promisor answerable for the debt of another. Scott v. Thomas, 1 Scamm. (Ill.) 58; and, in general, when the promise is substantially to answer for another's debt, it seems that, whatever the form, it should come within the operation of the statute.

Oral promise to become accommodation maker or indorser.— Thus the law is now well settled that a promise to give a guaranty or to become an accommodation indorser or maker on negotiable paper is within the statute; and indeed it is hard to see what difference there can be between a promise to give a collateral promise and the collateral promise itself. Carville v. Crane, 5 Hill 483; Taylor v. Drake, 4 Strobh. (S. C.) Law 431; Gallagher v. Nicholls, 60 N. Y. 438; Mallet v. Bateman, L. R. 1 C. P. 163. It is hardly within the scope of this note to consider the question of parol acceptances.

Promise to accept a bill of exchange. — This is rather a branch of the law merchant than of the statute of frauds; but when a parol promise to accept is not treated by the law merchant as tantamount to an actual acceptance, such a promise to accept an order or a bill of exchange is inoperative, unless the promisor have funds of the drawer in his possession. Manley v. Geagan, 105 Mass. 445; Pike v. Irwin, 1 Sandf. 14; Quin v. Hanford, 1 Hill (N. Y.) 82; Morse v. Mass. Nat. Bank, 1 Holmes (C. C.) 209; Wakefield v. Greenhood, 29 Cal. 597; Pfaff v. Cummings, S. C. Mich. Oct. 6, 1887; Chapline v. Atkinson, 45 Ark. 67 (1885); Louisville, etc., R. R. Co. v. Caldwell, 98 Ind. 245 (1884).

It was said by Mansfield, C. J., in Anstey v. Marden, supra, that an oral promise to pay a portion of the third party's debt was valid. But in Emmet v. Dewhurst, 3 McN. & G. 587, this distinction was entirely ignored by the lord chancellor. The statute embraces conditional promises to answer for the debt of another, as well as absolute promises. Barry v. Law, 1 Cranch (C. C.) 77; Fish v. Thomas, 5 Gray 45.

3. Debt, default, or miscarriage.

The word "debt" seems to have reference to liabilities growing out of contract, the word "miscarriage" to liabilities in tort, and the word "default" has been considered to be a connecting link between the two. See the language of Lord Ellenborough in Castling v. Aubert, 2 East 325. The word "default," however, seems to embrace future liabilities, which would not, perhaps, be covered by the terms "debt" and "miscarriage." In place of the word "miscarriage," the word "misdoings," or "doings," has been substituted in the statutes of several States.

Embraces liabilities in tort. — In two early English cases some doubt was expressed as to whether the statute applied to promises to answer for the tortious acts of another; Buckmyr v. Darnall, 2 Ld. Raym. 1085; Read v. Nash, 1 Wils. 305. But it is now universally admitted that such promises are within the operation of the statute; Kirkham v. Marter, 2 Barn. & Ald. 613; Combs v. Harshaw, 63 N. C. 198: Hayes v. Burkham, 51 Ind. 130; Hamm v. McAfee, 5 All. (N. B.) 386; Richardson v. Crandall, 48 N. Y. 348; Turner v. Hubbell, 2 Day 457.

The statute applies when the promise of the third person is implied.—The statute is held to apply where the promise of the third person is implied by law, as well as where there is an express promise; Redhead v. Cator, 1 Stark. 14; Whitcomb v. Klephart, 50 Penn. St. 85; and upon this principle it would seem that promises by a stranger to indemnify a surety, where there is an implied promise on the part of the principal to indemnify him, are within the statute. But see infra, under contracts of indemnity.

There must be a clearly defined liability of the third person.—
The general principle which governs the cases depending on the words "debt, default, or miscarriage" is that there must be a clear and ascertained legal liability of a third person to which the defendant's promise is collateral; Read v. Nash, 1 Wils. 305.
Thus in Jepherson v. Hunt, 2 Allen 417, an oral promise to pay interest on the agreed value of damages to the plaintiff's land resulting from its being taken by a railroad company, when the agreement with the company fixing the amount of damages was subject to the approval of the county commissioners, was held binding, since before the action of the commissioners the company itself was not liable for interest. So in Moorehouse v. Crangle, 36 Ohio St. 130 (1880), the statute was held not to

apply to an oral promise made to the plaintiff by the president of a corporation that if he would invest in its stock he should receive certain dividends, since there was no absolute duty on the part of the corporation to declare dividends. See also Hill v. Smith, 21 How. (U.S.) 283. So in a recent Vermont case under the clause in the statute in reference to promises by executors or administrators to answer damages out of their own estate, to which the same principle applies, it was held that a verbal promise by an executor to pay a certain sum of money to an heir at law in consideration of his forbearing to contest the will, was valid, since there was no liability on the part of the estate to which the defendant's promise was collateral; Bellows v. Sowles, 57 Vt. 164 (1884). On the general principle involved in these cases see also Downey v. Hinchman, 25 Ind. 453; Prentice v. Wilkinson, 5 Abb. Pr. N. S. 49; Mease v. Wagner, 1 McCord (S. C.) 395; Griffin v. Derby, 5 Greenl. (Me.) 476; Sampson v. Swift, 11 Vt. 315; Peck v. Thompson, 15 Vt. 637; Merrill v. Englesby, 28 Vt. 150; Walker v. Norton, 29 Vt. 226; Douglass v. Jones, 3 E. D. Smith (N. Y.) 551; Johnson v. Noonan, 16 Wisc. 722; Thompson v. Blanchard, 3 N. Y. 335; Holderbaugh v. Turpin, 75 Ind. 84; Baker v. Fuller, 69 Me. 152; Sutherland v. Carter, 52 Mich. 151 (1883). The principal liability may be that of a corporation as well as of a natural person; Andover Free Schools v. Flint, 13 Met. 539; Maule v. Bucknell, 50 Penn. St. 39.

Where the third person is under a disability. - It is generally laid down by the text-writers that when the third person is under a disability, the defendant's oral promise is valid. The reported cases on this branch of the law, however, are extremely unsatisfactory, especially in regard to promises to answer for the contracts of a married woman, in those jurisdictions where the disabilities of married women have not been removed by statute. See Maggs v. Ames, 4 Bing. 470; Connerat v. Goldsmith, 6 Ga. 14; Kimball v. Newell, 7 Hill (N. Y.) 116; Miller v. Long, 45 Penn. St. 350; Catron v. Warren, 1 Coldw. 368; Lanier v. Harwell, 6 Munf. 80. The English, New York, and Pennsylvania cases seem to hold that the defendant's promise is within the statute, while the last two cases cited hold that the oral promise is binding; Connerat v. Goldsmith was decided on the ground that the married woman's separate estate was liable, and that hence the defendant's promise was collat-

eral. In Kimball v. Newell, the action was brought on a sealed contract of guaranty, the principal being a married woman, and the point was raised by the defendant's counsel that upon general principles of suretyship, apart from the statute of frauds, the defendant could not be held in the absence of liability on the part of the principal. This application of a common doctrine of suretyship, however, the court refused to recognize, and it seems never to have received recognition from the courts of this country. But in the very important case of Mountstephen v. Lakeman, in the Exchequer Chamber (L. R. 7 Q. B. 196) and in the House of Lords (L. R. 7 H. L. 24), this principle was expressly adopted, though it had been ignored by the court of Queen's Bench, from which the case was carried up on appeal (L. R. 5 Q. B. 613). The defendant was sued upon an oral promise "to see the plaintiff paid" for services to be rendered to a local board of health, of which the defendant was chairman, but the board itself never authorized the performance of the work. In the Court of Queen's Bench it was ruled that the evidence showed that both parties to the contract supposed the board to be liable, and that the statute of frauds applied in such a case, even though as a matter of fact there was no liability of a third party. In the Exchequer Chamber and the House of Lords, this doctrine was expressly repudiated, on the ground that in such cases the statute of frauds could have no application.

"If the third person's liability is made the foundation of a contract between the plaintiff and the defendant, and that liability fails, the promise is void. If, in such a case, it turned out that the third party was not liable at all, the contract would fail, because there would be a failure of that which the parties intentionally made the foundation of the contract. The lex contractus itself would make an end of the claim, and not the application of the statute of frauds, whether the contract was in writing or not, and whether signed or not. There would be the condition precedent to the arising of any liability as surety, that there should be a principal debtor established," Willes, J., in the Exchequer Chamber. See also the opinion of Lord Selborne, in the House of Lords. The decision of the Queen's Bench, however, was overruled, on the ground that the evidence tended to show that the defendant's promise was original, and that no liability of the third party was contemplated. This general principle, that a promise framed strictly as a guaranty is void, where there is no principal liability, is of course of very broad application, including all cases where, for whatever reason, there is an absence of the contemplated liability on the part of the third person, to which the defendant's promise was intended to be collateral; and many cases have already been cited which have ignored this principle, in holding valid oral promises to answer for non-existing liabilities. According to the English case above cited, the absence of the third party's liability is merely evidence tending to show that the defendant's promise was contemplated by the parties as original and not collateral.

where the third person is an infant. — There are many dicta in the decisions to the effect that where the principal debtor is an infant, and the principal liability is not for necessaries, the statute does not apply. See Harris v. Huntbach, 1 Burr. 371; Roche v. Chaplin, 1 Bail. (S. C.) 419; Chapin v. Lapham, 20 Pick. 467; King v. Summitt, 73 Ind. 312; Evans v. Mason, 1 Lea 27; Thompson v. Dorsey, 4 Md. Ch. 149; Loomis v. Smith, 17 Conn. 115; Murner v. Klein, 17 U. C. C. P. 292. But, since the infant's contracts are only voidable, and the defence of infancy is a strictly personal one, it is difficult to see why a promise to answer for the obligation of an infant is not within the statute, and it has been expressly so held in Massachusetts upon this ground; Dexter v. Blanchard, 11 Allen 365. See also Clark v. Levi, 10 N. Y. Leg. Obs. 184.

Statute applies whether the obligation of the third person be present, past, or future. — Whether the liability of the third person arises prior to, contemporaneously with, or subsequently to, the defendant's promise, the statute will operate, provided only the two liabilities concur. The following recent cases are to the point that promises to answer for the future debts, defaults, and miscarriages of another must be in writing; Studley v. Barth, 54 Mich. 6 (1884); Smith v. Loomis, 72 Me. 51 (1881); Mead v. Watson, 57 Vt. 426 (1884).

Promise to answer for present and future obligations of third person.—We will now consider in general that whole class of cases in which there is no antecedent liability on the part of the third person, and, the defendant's promise being admitted, the only question is whether at the same time, or subsequently, there arose any liability to which the defendant's promise was collateral.

If sole credit be given to defendant, statute does not apply. -If goods are sold on the sole credit of the defendant, though delivered to a third party, the statute can have no application, though the promise was made wholly for the benefit of a third person. And the same principle applies to an oral promise to reimburse the plaintiff, if he would pay the debt of a third party, such payment not being made at his request; Pearce v. Blagrave, 3 Com. Law 338. And so of an oral promise to repay money, which the promisor requests the promisee to pay to a third person; Perkins v. Littlefield, 5 Allen 370. So in Elson v. Spraker, 100 Ind. 374 (1884), where a guardian promised a county treasurer, if he would give him a receipt for his ward's taxes, he would see them paid, it was held that it was tantamount to a promise to pay back money advanced at the promisor's request. See also Proprietors of Upper Locks v. Abbott, 14 N. H. 157; Ware v. Morgan, 67 Ala. 461; Kurtz v. Adams, 7 Eng. (Ark.) 174; McLendon v. Frost, 57 Ga. 450; Schoenfeld v. Brown, 78 Ill. 487; Wills v. Ross, 77 Ind. 1; Langdon v. Richardson, 58 Ia. 610; Graves v. Scott, 23 La. Ann. 690; Sanborn v. Merrill, 41 Me. 467; Myer v. Graffin, 31 Md. 350; Rose v. O'Linn, 10 Neb. 364; Patton v. Hassinger, 69 Penn. St. 311; Bagley v. Moulton, 42 Vt. 184; West v. O'Hara, 55 Wisc. 647; Loomis v. Newhall, 15 Pick. 159; Chapin v. Lapham, 20 Pick. 467; Swift v. Pierce, 13 Al. 136; Dean v. Tallman, 105 Mass. 443; Heywood v. Stiles, 124 Mass. 275; Barrett v. McHugh, 128 Mass. 165; Bugbee v. Kendricken, 130 Mass. 437 (1881); Struble v. Hake, 14 Ill. App. 546 (1882); Kessler v. Sonneborn, 10 Daly (N. Y.) 383; Davis v. Tift, 70 Ga. 52; Greene v. Burton, 59 Vt. 423 (1887); Sutherland v. Carter, 52 Mich. 151 (1883); Lance v. Pearce, 101 Ind. 595 (1884); DeWitt v. Root, 18 Neb. 567; King v. Edmiston, 88 Ill. 257; Baldwin v. Hiers, 73 Ga. 739 (1885); Hill v. Frost, 59 Tex. 25 (1883).

And it has been held in a recent Arkansas case that, where goods are bought in the name of the defendant by an unauthorized agent, an oral ratification is sufficient, although the goods were intended for the agent's own use; McTighe v. Herman, 42 Ark. 285 (1883).

Promise within statute if any credit be given to third person.—
It was at one time held by Lord Mansfield that unless there was a precedent liability of the third person, the statute of

frauds would not operate, because at the time of the defendant's promise there was no liability of a third person in existence to which the promise was collateral; Mawbrey v. Cunningham, cited in Jones v. Cooper, Cowper 227; and in D'Wolf v. Rabaud, 1 Pet. (U.S.) 476, Mr. Justice Story considers Lord Mansfield correct on principle, and intimates that if the question were res integra he should decide the same way. See also Townsley v. Sumrall, 2 Pet. (U.S.) 170; Perley v. Spring, 12 Mass. 296; Morse v. Massachusetts Bank, 1 Holmes (C. C.) 209; Evoy v. Tewksbury, 5 Cal. 286; Crooks v. Tully, 50 Cal. 254. This doctrine, whether founded upon principle or not, has long since been repudiated by the English courts and by nearly all the courts of the United States; Jones v. Cooper, supra; Peckham v. Faria, 3 Doug. 13; Matson v. Wharam, 2 T. R. 80; Tileston v. Nettleton, 6 Pick. 509; Cahill v. Bigelow, 18 Pick. 369; Hill v. Raymond, 3 Allen 540; Swift v. Pierce, 13 Allen 136; Chase v. Day, 17 John. 114; Brown v. Bradshaw, 1 Duer 199; Walker v. Richards, 41 N. H. 388; Moses v. Norton, 36 Me. 113; Walker v. McDonald, 5 Minn. 368; Cole v. Hutchinson, 34 Minn. 410 (1886); and see cases cited supra as to an oral promise being valid, when sole credit is given to the defendant. In Matson v. Wharam, supra, it was laid down by Mr. Justice Buller that if any credit whatever is given to the third person, the statute applies; and this is the generally accepted law of this country. See cases cited supra. It follows, therefore, and is well settled law, that the fact that the plaintiff trusted principally to the credit of the defendant is insufficient to take the promise out of the statute, and in a recent Massachusetts case the decision of the court below was overruled on this ground; Bugbee v. Kendricken, 130 Mass. 437 (1881).

When the defendant and third person assume a joint liability.— It has, however, been decided by several courts, and this view is supported by most of the text-writers, that the above rule of law applies only where the promisor's liability is distinct from that of the third person, the latter being primarily liable and the former secondarily, but that where they assume a joint liability, on the analogy of principle and surety, the statute has no application; Wainright v. Straw, 15 Vt. 215; Gibbs v. Blanchard, 15 Mich. 292; Hetfield v. Dow, 27 N. J. L. 440; Eddy v. Davidson, 42 Vt. 56; Glenn v. Lehnen, 54 Mo. 45; Boyce v. Murphey, 91 Ind. 1. But see Matthews v. Milton, 4

Yerg. (Tenn.) 576; Hill v. Doughty, 11 Ired. (N. C.) 195; Bugbee v. Kendricken, 130 Mass. 437 (semble); Cole v. Hutchinson, 34 Minn. 410 (semble), contra.

Trilateral theory of D'Wolf v. Rabaud. - In two decisions of the United States Supreme Court - D'Wolf v. Rabaud, 1 Pet. 476, and Townsley v. Sumrall, 2 Pet. 170 — we find dicta to the effect that, even where the two promises are distinct and several, the statute does not apply if the liabilities are independent of one another, and the defendant's promise is not collateral to that of the third person. This is the well known "trilateral liability" theory of D'Wolf v. Rabaud, so called from the language employed in his opinion by Mr. Justice Story. According to this doctrine, the defendant's oral promise is invalid only when it is such that he must be sued in special assumpsit; in other words, when it is a contract of guaranty strictly so called, the third person being liable primarily and the defendant secondarily. No case which has been adjudicated, however, has, it is believed, rested upon the "trilateral liability" theory, though some of the text-writers have attempted to defend it. It seems that its introduction was an attempt, made at a time when the disposition was to interpret the statute much more loosely than at the present day, to revert to the doctrine of Mawbrey v. Cunningham, so far as was consistent with the doctrine of stare decisis.

"Continuing liability" theory. — An important line of cases on the general subject now under consideration occurs where the third person is under a preëxisting contract with the plaintiff for work or labor to be rendered or materials to be furnished. This question generally arises when a sub-contractor or employé of a contractor refuses to continue to furnish materials or render work or labor, excepting on the promise of the hirer of the contractor to see him paid. Here again the only question is whether any credit was given the third person; in other words, whether the contract between the plaintiff and the third person continued in existence. The test has been said to be whether upon the performance of his contract by the promisee, he could recover against his original contractor. See Gill v. Herrick, 111 Mass. 501; Walker v. Hill, 119 Mass. 249; Warnick v. Grosholz, 3 Grant's Cases (Penn.) 234; Jefferson County v. Slagle, 16 P. F. Smith (Penn.) 202; Merriman v. McManus, 102 Penn. St. 102 (1882); Payne v. Baldwin, 14 Barb. 570; Noves v. Humphreys, 11 Gratt. 636; Bresler v. Pendell, 12 Mich. 224; Sinclair v. Richardson, 12 Vt. 33; Brown v. Weber, 38 N. Y. 187; Morissey v. Kinsey, 16 Neb. 17 (1884); Greene v. Burton, 59 Vt. 423 (1887); Hooker v. Russell, 67 Wisc. 257 (1886); Farnham v. Davis, 79 Me. 282 (1887); Bates v. Donnelly, 57 Mich. 521 (1885). But see Fitzgerald v. Morissey, 14 Neb. 198 (1883).

Question of credit for jury. — The promise of the defendant being admitted, the question whether any credit was given to the third person also, is for the jury to judge under all the circumstances of the transaction; Stone v. Walker, 13 Gray 613; Dean v. Tallman, 105 Mass. 443; Barrett v. McHugh, 128 Mass. 165; Bugbee v. Kendricken, 130 Mass. 437; Glenn v. Lehnen, 54 Mo. 45; Cowdin v. Gottgetren, 55 N. Y. 650; Bloom v. McGrath, 53 Miss. 249; Eshleman v. Harnish, 76 Penn. St. 97.

Question for the court when there is no evidence to control language used. - But in the absence of all other evidence, the precise language used by the defendant is ruled as a matter of law to import either an original or collateral promise. Thus, when uncontrolled by other evidence, the words "I will see you paid," or "I will pay if he does not," are held to import a collateral promise, while the words "I will be your paymaster" import an original promise; Birkmyr v. Darnell, principal case; Watkins v. Perkins, 1 Ld. Raymond 224. See also Keate v. Temple, 1 B. & P. 158; Elder v. Warfield, 7 Harr. & J. 397; Chase v. Day, 17 Johns. 114; Smith v. Hyde, 19 Vt. 54; Hetfield v. Dow, 27 N. J. L. 440; Billingsley v. Dempewolf, 11 Ind. 414; Warwick v. Grosholz, 3 Grant (Penn.) 234. But, whatever the language used, evidence is admissible to show that an original promise was intended. Thus in Mountstephen v. Lakeman, cited supra, the fact that the third person was a stranger to the transaction, and had incurred no liability, was held evidence to show that the defendant's promise was original. See also Masters v. Marriott, 3 Lev. 363; Gordon v. Martin, Fitz. 302; Blodgett v. Lowell, 33 Vt. 174; Blank v. Dreher, 25 Ill. 331; Mease v. Wagner, 1 McCord (S. C.) 395; Walker v. Norton, 29 Vt. 226; Ledlow v. Becton, 36 Ala. 596; Greene v. Burton, 59 Vt. 423 (1887). As has been already seen, however, according to the doctrine of Mountstephen v. Lakeman, if the defendant's promise be so expressed as to be unmistakably collateral and dependent upon the liability of a third party, on common-law principles, it will be void, in the absence of such principal liability, and the statute can have no application.

Entries in plaintiff's books are evidence. — The fact of goods being charged to the third party, on the plaintiff's books, or the presentment to him of the bill therefor, is strong evidence that some credit was given to him, though not conclusive; Dean v. Tallman, 105 Mass. 443; Swift v. Peirce, 13 Allen 136; Burkhalter v. Farmer, 5 Kans. 477; Myer v. Grafflin, 31 Md. 350; Champion v. Doty, 31 Wisc. 190; Hill v. Raymond, 3 Allen 540; Walker v. Hill, 119 Mass. 249; Ruggles v. Gatton, 50 Ill. 412; Larson v. Wyman, 14 Wend. (N. Y.) 246; Pennell v. Pentz, 4 E. D. Smith 639; Lance v. Pearce, 101 Ind. 595 (1884); Larson v. Jensen, 53 Mich. 427 (1884); Morris v. Osterhout, 55 Mich. 262 (1885); Walker v. Richards, 41 N. H. 388; Foster v. Persch, 68 N. Y. 400; Barrett v. McHugh, 128 Mass. 165; Hazen v. Bearden, 4 Sneed 48; Greene v. Burton, 59 Vt. 423 (1887). It would seem to have been held, however, that the debiting of the account to the defendant, on the plaintiff's books, or the presentment of the bill to him, are not evidence in the plaintiff's favor to show that he trusted solely to the defendant's credit, when the goods were, in fact, delivered to a third person; Poultney v. Ross, 1 Dall. (Penn.) 238; Cutler v. Hinton, 6 Rand. (Va.) 509; Kinloch v. Brown, 1 Rich. (S. C.) Law 223; Walker v. Richards, 41 N. H. 388. See Eshleman v. Harnish, 76 Penn. St. 97; Hardman v. Bradley, 85 Ill. 162. But Mr. Throop, in his treatise on the Validity of Verbal Agreements, has taken exception to this view of the law, and cites Keith v. Kibbe, 10 Cush. 35, in his support; Throop, § 102 note c.

Promise to answer for an antecedent indebtedness of a third person.— We will now consider that class of cases where the liability of the third person existed before the defendant's promise. On this branch of the subject, the main question is whether the third person remained liable after the promise of the defendant was made.

Statute does not operate if third person's liability be discharged.— If the third person's liability be discharged, it is now well established that the defendant's oral promise is valid. This doctrine was severely denounced soon after its announcement in England, by Mr. Roberts, in his excellent work on the subject: Roberts on Frauds, pp. 224–225; but his reasoning has not met with favor, either in this country or in England.

In the earliest case, Goodman v. Chase, 1 B. & Ald. 297, the discharge of the third party resulted from his release under a capias ad satisfaciendum. A question presenting considerable difficulty is, whether the defendant's oral promise is within the statute, where the consideration is the promise of the plaintiff to discharge the indebtedness of the third person at some future time. It is hard to see on principle why the statute should not apply, since there is a period of time during which the two promises coexist. But it seems to have been held otherwise; Goodman v. Chase, cited supra; Butcher v. Drummond, 11 M. & W. 857. See also Chater v. Beckett, 7 T. R. 201; Ganns v. Hill, 1 Stark. 10; Chamber, J., in Anstey v. Marden, 4 B. & P. 124.

In America, however, it seems to be assumed in all the cases that the discharge of the liability of the third person must be contemporaneous with the promise of the defendant. See Watson v. Jacobs, 29 Vt. 169; Corbett v. Cochran, 3 Hill (S. C.) 41; Walker v. Penniman, 8 Gray 233; Stone v. Symmes, 18 Pick. 467; Richardson v. Williams, 49 Me. 558; Ellison v. Wisehart, 29 Ind. 32; Cotterill v. Stevens, 10 Wisc. 422; Watson v. Randall, 20 Wend. 201; Jolley v. Walker, 26 Ala. 690; Wagoner v. Gray, 2 H. & M. (Va.) 603; Draughan v. Bunting, 9 Ired. (N. C.) 10.

Most cases under this branch of the statute, when the discharge of the principal debtor results from the acts of the parties themselves, may be treated under one or the other of two novations, well known to the civil law, and to each of them the statute of frauds has no application.

Simple novation. — The first is the simple case of the defendant's promising the plaintiff to pay the preëxisting debt of a third party in consideration of the discharge of that debt. It is held that, whereas the assent of the third person is necessary, no formal release or discharge is requisite. The assent of all parties is sufficient to operate the third person's discharge, and the entry of such discharge in the plaintiff's books is admissible in evidence. The cases on this general subject are very numerous: but see Langdon v. Hughes, 107 Mass. 272; Bird v. Gammon, 3 Bing. N. C. 883; Emmett v. Dewhurst, 3 McNaughton & G. 587; Watson v. Jacobs, 29 Vt. 169; Walker v. Penniman, 8 Gray 233; Wood v. Corcoran, 1 Allen 405; Stone v. Symmes, 18 Pick. 467; Willard v. Bosshard, 68 Wisc.

454 (1887); Flournoy v. Van Campen, 71 Cal. 14 (1886); Doss v. Peterson, 82 Ala. 253 (1886); Radcliff v. Poundstone, 23 W. Va. 724 (1883); Thornton v. Guice, 73 Ala. 321 (1882); Jones v. Walker, 13 B. Mon. 357; Whittemore v. Wentworth, 76 Me. 20 (1884); Bates v. Donnelly, 57 Mich. 521 (1885). Where the third person and the new promisor assume a joint liability, it has been held, on this principle, that the statute does not apply if the old several liability of the third person be discharged. Ex parte Lane, 1 De Gex's Bankruptcy Rep. 300; Corbin v. McChesney, 26 Ill. 231.

Double novation.—The second class of novation is where the defendant is himself the debtor of the third party, and by a tripartite arrangement there is a substitution of his debt for the debt owed by the third person. Here both intermediate debts are extinguished and the statute of frauds is held to have no application; Tatlock v. Harris, 3 T. R. 174; Browning v. Stallard, 5 Taunt. 450; Cuxon v. Chadley, 3 B. & C. 591; Ramsdale v. Horton, 3 Barr. 330; Barringer v. Warden, 12 Cal. 311; Presbyterian Society v. Staples, 23 Conn. 544; Millard v. Porter, 18 Ind. 503; Stanly v. Hendricks, 13 Ired. (N. C.) 86; King v. Hutchins, 28 N. H. 561; Cook v. Barrett, 15 Wisc. 596; Howell v. Field, 70 Ga. 592 (1883); Abbott v. Nash, 35 Minn. 451 (1886); Mulcrone v. Am. Lumber Co., 55 Mich. 622 (1885).

4. Of another (a) than the promisee.

In general. — According to the interpretation which the courts have given to this clause of the statute, an oral promise to pay the debt of a third person is valid, if made to the third person himself; secus, if made to the creditor. By this construction the statute is interpreted to mean that no action shall be brought upon any special promise to one person to answer for the debt, default, or miscarriage of another person. In England this question first came up for express adjudication in Eastwood v. Kenyon, 11 Ad. & El. 438. In the judgment rendered in that case Denman, C. J., says that the statute only applies to promises made to the person to whom another is answerable. The doctrine announced in that case was followed in Hargreaves v. Parsons, 13 M. & W. 561. Even before the decision of this question in England, the same rule of law had already been adopted by the great weight of authority in this country;

Allaire v. Ouland, 2 John. Cases 52 (1800); Chapin v. Merrill, 4 Wend. 657; Colt v. Root, 17 Mass. 229; Weld v. Nicholls, 17 Pick. 538; Preble v. Baldwin, 6 Cush. 549; Pratt v. Humphrey, 22 Conn. 317. Upon the same principle were decided also Alger v. Scoville, 1 Gray 391; Hubon v. Park, 116 Mass. 541; Soule v. Albee, 31 Vt. 142; Fiske v. McGregory, 34 N. H. 414; North v. Robinson, 1 Duv. (Ky.) 71; Wilson v. Beavans, 58 Ill. 232; Crim v. Fitch, 53 Ind. 215; Kauffman v. Harstock, 31 Ia. 473; Center v. McQuesten, 18 Kans. 476; Pratt v. Bates, 40 Mich. 38; Goetz v. Foos, 14 Minn. 265; Howard v. Coshow, 33 Mo. 118; Apgar v. Hiler, 4 Zab. (N. J.) 812; Ware v. Allen, S. C. (Miss.), March 21, 1887. In Tennessee, however, oral promises are held to be within the statute, even though made to the debtor; Campbell v. Findley, 3 Humph. (Tenn.) 330. See also Nixon v. Van Hise, 2 South. (N. J.) 491; Mundy v. Ross, 3 Green (N. J.) 466. In an English case in the Court of Common Pleas, in 1862, a novel application of this general principle was made, where the defendant's promise was made neither to the creditor nor the debtor, but to a stranger to the principal contract, and the statute was held not to apply; Reader v. Kingham, 13 C. B. N. S. 344. A common illustration of this doctrine, that promises made to the debtor are not within the statute, is that class of cases where oral promises made by the grantee to the grantor of real estate, to pay taxes already assessed, or to indemnify him against all claims on account of a party wall, are held to be without the statute; Wolke v. Flemming, 103 Ind. 105 (1885); Smart v. Smart, 97 N. Y. 559 (1885); Preble v. Baldwin, 6 Cush. 549; Weld v. Nicholls, 17 Pick. 538. So also promises by assignee to assignor of lease to pay rent. As to the right of the creditor to enforce an oral promise made to the debtor, see infra, under the "funds" rule.

Contract of indemnity.— The class of cases which we have last considered arose out of promises to discharge an obligation of the debtor already incurred by him, such promises being founded upon some distinct consideration moving from the debtor to the defendant. We are now to consider promises of indemnity, properly so called, where the assumption of some liability by the third person is the consideration of the defendant's promise. That the statute does not apply to such promises in general is perfectly well settled law, on the principle

which we are now considering, that promises made to the debtor are not within the statute, and there is no distinction in this respect between promises to pay a precedent debt of a third party, and a promise to indemnify him against a liability assumed on the strength of the defendant's promise. Thus in Adams v. Dansey, 6 Bing. 506, it was held that the statute did not apply to a promise to indemnify the plaintiff against a suit brought for a trespass committed by him at the instance of the defendant, for the purpose of raising a question of title. So where the plaintiff at the defendant's request made a note to a third party, the promise of the defendant to save the maker harmless is without the operation of the statute; Hull v. Brown, 35 Wisc. 652; Green v. Brookens, 23 Mich. 48. So a promise by a stranger to an officer to save him harmless, if he will take certain goods on mesne process or on execution, in the absence of directions from the plaintiff in the suit to that effect; Luck v. Gallup, 67 Cal. 595 (1885). And see in general; Allaire v. Ouland, 2 John. Ca. 52; Marcy v. Crawford, 16 Conn. 549; Peck v. Thompson, 15 Vt. 637; Goodspeed v. Fuller, 46 Me. 141; Flemm v. Whitmore, 23 Mo. 430; Dorwin v. Smith, 35 Vt. 69.

Contracts of indemnity where a third person is liable to the promisee. — When the obligation assumed by the promisee is itself in the nature of a guaranty, so that its fulfilment raises an implied promise on the part of a third person to reimburse him, it has been decided by several courts, and this view is sustained by most of the text-writers on the subject, that the oral promise of the defendant to indemnify him is within the statute on the ground that it is collateral to the implied promise of a third person. This question has generally arisen on promises to indemnify bail on account of the liability assumed by him at the request of the promisor; Thomas v. Cook, 8 Barn. & C. 728, and Green v. Cresswell, 10 Ad. & El. 453, are now generally considered irreconcilable, though, in the past, efforts have been made to distinguish them. In the former case the oral promise of indemnity was held to be valid, while in the latter the statute was held to apply. In Wildes v. Dudlow, L. R. 19 Eq. 198, Vice-Chancellor Malins refers to the case of Green v. Cresswell as overruled. See also Cripps v. Hartnoll, 4 Best & S. 414.

In this country, also, the weight of authority is to the effect that such promises are without the operation of the statute; Perley v. Spring, 12 Mass. 297; Chapin v. Lapham, 20 Pick.

467; Aldrich v. Ames, 9 Gray 76; Sanders v. Gillespie, 59 N. Y. 250; Holmes v. Knights, 10 N. H. 175; Cutter v. Emery, 37 N. H. 567; Smith v. Sayward, 5 Greenl. 504; Reed v. Holcomb, 31 Conn. 360; Beaman v. Russell, 20 Vt. 205; Apgar v. Hiler, 24 N. J. L. 812; Cortelyou v. Hoagland, 40 N. J. Eq. 1 (1885); Jones v. Shorter, 1 Kelley (Ga.) 294; Jones v. Letcher, 13 B. Mon. 363; Vogel v. Melms, 31 Wisc. 306; Anderson v. Spence, 72 Ind. 315; Potter v. Brown, 35 Mich. 274; Mills v. Brown, 11 Ia. 314. In a very recent case in Pennsylvania, the court had occasion for the first time to pass upon this question, this clause of the statute having only recently been introduced into the jurisprudence of that State by legislative enactment. The question, therefore, was res integra in this jurisdiction, and the court, untrammelled by precedents, decided it on principle solely. It was held that an oral promise of indemnity was within the statute, when there was an implied promise of a third person to which the promise of the defendant was collateral; Nugent v. Wolfe, 111 Penn. St. 471 (1886). In Macy v. Childress, 2 Tenn. Ch. 438 (1875), the learned chancellor (Cooper), in a very able judgment, reviews the authorities on this much disputed question, and the principles upon which the courts have relied as the ground of their decisions. He says: "The difficulty of finding a principle which logically leads to the conclusion that a promise to indemnify is not within the statute is evidenced by the fact that no two of the decisions to that effect assign the same reason. At the outset it was the existence of an independent consideration that swayed the master minds of Lord Hardwicke in Tomlinson v. Gill, of Chancellor Kent in Leonard v. Vredenburgh, and of Mr. Justice Story in D'Wolf v. Rabaud; Chief Justice Shaw puts his decision on the ground that the promise, to be within the statute, must be to the creditor, whereas the promise to indemnify is made to the debtor (Aldrich v. Ames, cited supra); Chief Justice Parker, with better logic, insists that the promise to indemnify is the main inducement to the risk, even if the principal obligor be also bound, either expressly or by implication (Holmes v. Knights, cited supra); while the Supreme Court of Kentucky rest their ruling on the ground that the action in favor of the surety against the principal obligor would be founded upon an assumpsit raised by a subsequent fact, to wit the payment of

the debt, which would not prove that there was any contract, express or implied, between him and the surety when the obligation was signed (Jones v. Letcher, cited supra). In other cases the courts seem to be influenced rather by the inherent equity of the particular case than by any connected chain of reasoning which will stand the test of logic. A line of decisions, sustained by such diverse reasoning, and resting upon no universally recognized principle, cannot be relied upon as a sure guide." The conclusions of the chancellor are in favor of holding this class of promises of indemnity within the operation of the statute of frauds. Draughan v. Bunting, 9 Ired. (N. C.) 10; Easter v. White, 12 Ohio St. 219; Kelsey v. Hibbs. 13 Ohio St. 340; Ferrell v. Maxwell, 28 Ohio St. 383; Simpson v. Nance, 1 Speers (S. C.) 4; Golden v. Pierson, 42 Ala. 370; Garner v. Hudgins, 46 Mo. 399; May v. Williams, 61 Miss. 125 (1883); Brand v. Whelan, 18 Ill. App. 186 (1885), are in accord.

(b) Than the promisor. — That the statute of frauds was not intended by its framers to embrace promises the effect of the fulfilment of which is to discharge some liability of the promisor himself, is a broad principle which has been recognized ever since the courts were first called upon to interpret the statute, soon after its passage in 1677. But the cases are hopelessly in conflict as to the application of this general principle, and of the various rules and doctrines which have been formulated on the subject; few of them have met with universal recognition, and some of them have been rejected by the very courts which had previously adopted them. Even at the present day the law on this subject is in a very unsettled state; and judges and text-writers alike differ, not only as to the true test to be invoked, but even as to the application of that test to particular cases. It may be said, however, that the present tendency, both in England and in this country, is strongly in the direction of enforcing strictly the provisions of the statute, whenever the courts feel uncontrolled by previous judicial decision. In Mallet v. Bateman, L. R. 1 C. P. 163 (1865), Pollock, C. B., referring to the decisions of the courts under the statute of uses, as having practically nullified that statute, says: "I hope we shall avoid falling into a similar error in construing the statute of frauds." The class of cases which we are now about to consider, where there is an incidental liability of a third person, it is common to denominate as within the terms of

the statute, but without its spirit and intent. Mr. Throop, in his valuable work, already frequently referred to, has adopted this principle in his classification. See also the language of Gray, J., in Furbish v. Goodnow, 98 Mass. 296. But it seems, by the weight of modern authority, that all the decisions which are undisputed law may be said to be confined strictly to promises to discharge an obligation resting upon the promisor himself, and not upon "another" than the parties to the contract. Such promises may be said, therefore, to be without the very terms of the statute. It is this disposition to carry out the spirit and intent of the statute which has led to so loose a construction of it in the past.

Statute does not apply when the promise is substantially to pay the defendant's own debt.—It is well settled, then, that, whatever the form of the defendant's promise, if the effect of its fulfilment is to discharge a preëxisting liability of his own, the statute of frauds does not affect its validity; Macrory v. Scott, 5 Exch. 907; Hoover v. Morris, 3 Ohio 56; Tarbell v. Stevens, 7 Ia. 163; De Walt v. Hartzell, 7 Col. 601 (1884); Teeters v. Lamborn, 43 Ohio St. 144 (1885).

Where promisor had been jointly liable with third person.—So an oral promise by one of two parties, who are already jointly or severally liable to the promisee for the same thing, to assume the entire liability is without the operation of the statute; Stephens v. Squire, 5 Mod. 205; Files v. McLeod, 14 Ala. 611; Aiken v. Duren, 2 Nott & McC. (S. C.) 370; Durham v. Manrow, 2 N. Y. 533; Rice v. Barry, 2 Cranch (C. C.) 447; Douglass v. Jones, 3 E. D. Smith 551; Hopkins v. Carr, 31 Ind. 260; Hoggatt v. Thomas, 35 La. Ann. 298 (1884); Batson v. King, 4 Hurl. & N. 739; Orrell v. Coppock, 26 L. J. Ch. 269; Headrick v. Wiseheart, 57 Ind. 129.

Promise to accept when promisor has funds of drawer. — According to this principle, also, a verbal acceptance or promise to accept an order or bill of exchange, when the promisor has in his possession funds belonging to the drawer, is valid; Pillans v. Van Mierop, 3 Burr. 1664; Grant v. Shaw, 16 Mass. 341; Shields v. Middleton, 2 Cranch (C. C.) 205; Pike v. Irwin, 1 Sandf. (N. Y.) 14; Strohecker v. Cohen, 1 Speers (S. C.) Law 349; Leonard v. Mason, 1 Wend. (N. Y.) 522; Raborg v. Peyton, 2 Wheat. (U. S.) 385; Townsley v. Sumrall, 2 Peters (U. S.) 170; Nelson v. First Nat. Bank of Chicago, 48 Ill. 36;

Spaulding v. Andrews, 48 Penn St. 411; Louisville, etc., R. R. Co. v. Caldwell, 98 Ind. 245 (1884); Mitts v. McMorran, S. C. (Mich.) Feb. 3, 1887.

Promise to waive a technical defence. — So the better law is that an oral promise by an indorser who has been discharged by the laches of the holder to pay the note, is valid; Uhler v. Farmers' Nat. Bank, 64 Penn. St. 406; U. S. Bank v. Southard, 2 Harr. (N. J.) 473; Ashford v. Robinson, 8 Ired. (N. C.) Law 114. But see Peabody v. Harvey, 4 Conn. 119, contra. The mere waiver of a technical defence would hardly seem to come within the operation of the statute. Thus it was held by Lord Ellenborough that when an action on a written guaranty was barred by the statute of limitations, an oral promise would revive it; Gibbons v. McCasland, 1 B. & Ald. 690. When a partner pledges the credit of a partnership for his own or a third person's debt, it has been held that an oral promise by the other partner to pay the note is within the statute; Wagnor v. Clay, 1 A. K. Marsh (Ky.) 257; Taylor v. Hillyer, 3 Blackf. (Ind.) 433. But it has been argued with much force that such a promise is merely a waiver of a technical defence, and is essentially a promise to pay one's own debt.

Promise to pay transferee of defendant's creditor. - In the United States it is now generally settled, where the defendant orally promises to pay a debt of his own to his creditor's transferee, who himself took the assignment as security for a debt which still exists, that the statute has no application, though the effect of the performance of the promise is to discharge the liability of a third person; Phillips v. Gray, 3 E. D. Smith 69; Putney v. Farnham, 27 Wisc. 187; Beardslee v. Morgner, 4 Mo. App. 139; Indiana Manf. Co. v. Porter, 75 Ind. 429. But see The First Baptist Church of Chicago v. Hyde, 40 Ill. 150; semble, contra. In England, the cases on this subject are in a state of great confusion. See Lacy v. McNeile, 4 Dowl. & R. 7; Wharton v. Walker, 4 B. & C. 163; Hodgson v. Anderson, 3 B. & C. 842. So it has been held in the United States that a promise made to a transferee of the creditor is without the statute, when the transferor had guaranteed payment; Mount Olive Cemetery Co. v. Shubert, 2 Head (Tenn.) 120; Rider v. Riely, 2 Md. Ch. 16.

Defendant estopped to set up the liability of a third person. -Where a promise on a good consideration is made in consequence of a claim against the promisor, and he alleges in defence that he was not liable for the original demand, but that a third person was liable, whose discharge would result from the fulfilment of the promise, it is now generally held that the promisor is estopped to deny his original liability, and that the statute of frauds has no application. Thus in Fish v. Thomas, 5 Gray 45, on this principle it was decided, where there was a dispute as to the validity of a lien on a vessel for materials furnished to a builder, and the owner, in consideration of the defendant's releasing the lien, promised to pay the claim, it was held that the defendant was estopped to deny the validity of the lien, and that the promise was not within the statute, although the liability of the builder still existed. See also Orrell v. Coppock, 26 Law Journal N. S. 269; Tarbell v. Stevens, 7 Ia. 163; Hoover v. Morris, 3 Ohio 56. But see Holingsworth v. Martin, 23 Ala. 591.

Oral guaranties by the assignor of choses in action. - There is a very important line of cases in the United States which have generally been decided on the principle which we are now considering, which present the question whether the oral guaranty of a debt, whether in the form of negotiable paper or not, transferred by the defendant to the plaintiff in payment of some preëxisting claim, or upon some new consideration moving between the parties, is within the statute. Though not always agreed as to the ground of decision, the courts are generally in accord in holding such oral guaranties to be without the statute; Lossee v. Williams, 6 Lans. (N. Y.) 228; Johnson v. Gilbert, 4 Hill (N. Y.) 178; Malone v. Keener, 44 Penn. St. 107; Barker v. Scudder, 56 Mo. 272; Wyman v. Goodrich, 26 Wisc. 21; Cardell v. McNiel, 21 N. Y. 336; Mobile & Girard R. R. v. Jones, 57 Ga. 198; Bruce v. Burr, 67 N. Y. 237; Allen v. Eighmir, 14 Hun 559; Milks v. Rich, 80 N. Y. 269 (1880); King v. Summitt, 73 Ind. 312; Hassinger v. Newman, 83 Ind. 124 (1882); Darst v. Bates, 95 Ill. 493 (1880); Cribb v. Houghton, 64 Wisc. 333 (1885). The ground of decision in most of these cases is that the defendant's promise is substantially to pay his own debt; and in Massachusetts the principle has been carried so far that, where a promissory note of a third person was given in absolute payment of a precedent debt, an

oral guaranty of that note was held to be within the statute, on the ground that it could not in that case be treated as a promise to pay the defendant's own debt, since that debt was extinguished by the very instrument which the promisor had guaranteed; Dows v. Swett, 120 Mass. 323; Id. 134 Mass. 140 (1883). In this case the note guaranteed was made payable directly to the plaintiff, and the defendant was never a holder thereof, and Mr. Browne (Browne on the Statute of Frauds, § 165, a. 4th. ed.) has endeavored to distinguish it upon this ground; but in the later decision of the case the judgment was made to rest on the broad principle that where all further liability of the defendant is extinguished the promise is within the statute. The reason for excluding this class of cases from the operation of the statute is sometimes said to be because the leading purpose of the transaction is to benefit the promisor (see "leading purpose" rule, infra); and again, in the case of negotiable paper, because it is only a slight extension of the implied warranty of title and of the genuineness of the signatures on the instrument; see King v. Summitt, 73 Ind. 312. The only English case upon this subject, which was in regard to the guaranty of a non-negotiable instrument, assigned by the defendant to the plaintiff, proceeded on the ground that the assignee could not enforce payment against the debtor in his own name, and therefore there was no liability of a third person to the plaintiff; Hargreaves v. Parsons, 13 M. & W. 561.

Release of lien. - Growing out of the principle now under consideration, that the defendant's promise is not within the statute, when the result of its performance is to discharge some liability of his own, is that important line of cases which hold that a preëxisting liability of the defendant's property is sufficient to render valid his oral promise to discharge that lia-Where the promisor, in consideration of the release of a lien which enures directly to the advantage of himself or his property, agrees to pay the debt thereby secured, the authorities are entirely harmonious in holding such an agreement without the statute. Though the debt was originally contracted by a third person, who still remains liable, the statute is held not The true principle of these cases seems to be that the defendant's promise is in substance to pay his own debt. The latest English case on this subject is Fitzgerald v. Dressler, 7 C. B. N. S. 374 (1859). Cockburn, C. J., said that "the rule

is correctly laid down in the notes to Forth v. Stanton, 1 William's Saunders, page 211 (e), that the question whether each particular case comes within this clause of the statute or not depends, not on the consideration of the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant, or his property, except such as arises from his express promise." His Lordship added that it is "truly stated there, as the result of the authorities, that if there be something more than a mere undertaking to pay the debt of another, as when the property in consideration of the giving-up of which the party enters into the undertaking is in point of fact his own, or is property in which he has some interest, the case is not within the provisions of the statute; which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another where the person making the promise has himself no interest in the property which is the subject of the undertaking." It seems much better to treat this class of cases as resting upon the undisputed principle above referred to, rather than to consider them as embraced by more comprehensive, but less generally recognized, principles, such as the "funds" rule, the "new consideration" rule, or the "leading purpose" rule, about the soundness of each and all of which there is so much disagreement in the reported decisions. The following American cases, though differing widely in the ground of decision, arrive at the same result in holding such oral promises without the operation of the statute; Burr v. Wilcox, 13 Allen 269; Richardson v. Robbins, 124 Mass. 105; Wills v. Brown, 118 Mass. 137; Fears v. Story, 131 Mass. 47 (1881); Young v. French, 35 Wisc. 111; Mitchell v. Griffin, 58 Ind. 559; Arnold v. Stedman, 45 Penn. St. 186; Cross v. Richardson, 30 Vt. 641; Stewart v. Campbell, 58 Me. 439; Scott v. White, 71 Ill. 287; Fay v. Bell, Hill & D. (N. Y.) 251; Corkins v. Collins, 16 Mich. 478; Weisel v. Spense, 59 Wisc. 301 (1883).

Release of lien on property belonging to a third person.—If the property benefited by the release of the lien belongs to a third person, according to the great weight of modern authority an oral promise is invalid. The promise cannot then be treated as one to pay the promisor's own debt; Nelson v. Boynton, 3 Met. 396; Mallory v. Gillett, 21 N. Y. 413; Duffy v. Wunsch, 42 N. Y. 243; and see cases cited supra.

Purchase of lien. — There is, however, a class of cases where the lien or security is purchased by the defendant and kept alive for his benefit; Castling v. Aubert, 2 East 325. In this case, there was merely an assignment of the debt and of the lien by which it was secured, and the oral promise was held to be valid. See Anstey v. Marden, 1 B. & P. N. R. 124; Edwards v. Kelly, 6 M. & S. 204; Allen v. Thompson, 10 N. H. 32; Gardiner v. Hopkins, 5 Wend. (N. Y.) 23; French v. Thompson, 6 Vt. 54; Olmstead v. Greenly, 18 John. (N. Y.) 12; Hindman v. Langford, 3 Strobh. (S. C.) Law 207.

Omission to perfect an inchoate lien. — The question has arisen whether an omission on the part of the plaintiff to perfect by legal proceedings an inchoate lien is sufficient to take the defendant's oral promise out of the statute, and it would seem that it is. See Templeton v. Bascomb, 33 Vt. 132; Fish v. Thomas, 5 Gray 45; Landis v. Royer, 59 Penn. St. 95; Benedict v. Dunning, 1 Daly 241; Brightman v. Hicks, 108 Mass. 246.

Executory agreement for the release of a lien. — Another question which presents considerable difficulty is whether a promise to release a lien made by the plaintiff is sufficient to take the defendant's promise out of the statute. But since it is in the nature of a mere executory sale, there would seem to be no solid reason why the statute should apply, and upon this ground the decisions in Prime v. Koehler, 77 N. Y. 91, and Williamson v. Hill, 3 Mackey (D. C.) 100 (1884), would seem to be correct. But see Vaughn v. Smith, 65 Ia. 579 (1885); Westmoreland v. Porter, 75 Ala. 452 (1883), contra.

In Fears v. Story, 131 Mass. 47, the temporary abandonment of a lien on a vessel for materials furnished, by allowing her to go to sea, was held sufficient to make the defendant's promise valid. This decision would seem, perhaps, to have gone too far, since there was no release of the lien to the defendant, and upon the vessel's return to port it could still be enforced.

"Funds" rule. — In England and Massachusetts, the "funds" rule has never been adopted, though the principle was originally introduced into the jurisprudence of most of the States of this country on the authority of dicta contained in some of the earlier English decisions. See Williams v. Leper, 3 Burr. 1886; Edwards v. Kelly, 6 M. & S. 204. The true foundation of this principle is considered to be different in the different States; and the views as to its application and extent are almost as

various as the courts that have passed upon it. In two celebrated cases, Fullam v. Adams, 37 Vt. 391, and Maule v. Bucknell, 50 Penn. St. 39, it is said that the "funds" rule embraces all cases where, though the third person still remains liable, the oral promise of the defendant is held to be binding.

Oral promise to creditor in consideration of funds received from debtor. - Where the defendant, in consideration of property or funds transferred to him by the debtor for that purpose, promises the creditor to pay the debt, in nearly all the States of this country it is held that the promise is supported by a good consideration at common law, and that such a promise need not be in writing by reason of the statute of frauds. It is necessary, however, that the promisor should absolutely control the fund, and that he should owe a duty to the third person, of which he will be acquitted by the performance of his promise. The rationale of this principle is generally said to be, that the defendant's promise is not to pay the debt out of his own property, but out of that of the third party, and, therefore, is not within the spirit of the statute. But a more tenable reason seems to be that the promise to the creditor is in effect a promise to discharge an obligation which the promisor owes the debtor. In New York the ground of decision seems to be that there is a new consideration enuring to the benefit of the promisor; Mallory v. Gillett, 21 N. Y. 412. In Massachusetts it seems that the fact of the promisee being a stranger to the consideration is sufficient to defeat his recovery on common-law principles; Mellen v. Whipple, 1 Gray 317; Exchange Bank of St. Louis v. Rice, 107 Mass. 37. But see Carnegie v. Morrison, 2 Met. 381; Brewer v. Dyer, 7 Cush. 337; Frost v. Gage, 1 Allen 262; Putnam v. Field, 103 Mass. 556. In this country, however, by the great weight of authority, it is held that on common-law principles an action will lie upon such a promise, and that the statute of frauds does not require it to be in writing. See Merrill v. Englesby, 28 Vt. 150; Madden v. McCray, 1 McCord (S. C.) 486; Clark v. Hall, 6 Halst. (N. J.) 78; Hilton v. Dinsmore, 21 Me. 410; Robinson v. Gilman, 43 N. H. 485; Shaver v. Adams, 10 Ired. (N. C.) 13; Mallory v. Gillett, 21 N. Y. 412; Fullam v. Adams, 37 Vt. 391; May v. Nat. Bank of Malone, 9 Hun (N. Y.) 108; Calkins v. Chandler, 35 Mich. 320; Bailey v. Bailey, 56 Vt. 398 (1883); Shaaber v. Bushong, 105 Penn. St. 514 (1884); Ackley v.

Parmenter, 98 N. Y. 425 (1885); Hoile v. Bailey, 58 Wisc. 434; Stoudt v. Hine, 45 Penn. St. 30.

Rule in New York and Pennsylvania. — In New York, the recent cases are to the effect that an oral promise is invalid which is made to the creditor before the property transferred to the promisor by the principal debtor has been converted into current funds; Belknap v. Bender, 75 N. Y. 446; Ackley v. Parmenter, 98 N. Y. 425 (1885); and in Pennsylvania it is held that a promise to pay absolutely, and not out of the funds, is within the operation of the statute; Shoemaker v. King, 40 Penn. St. 107; Shaaber v. Bushong, 105 Penn. St. 514 (1884). See also Justin v. Tallman, 86 Penn. St. 147 (1878).

Tripartite agreement between plaintiff, defendant, and third person. - Another very common class of cases is where an actual debt is created between the promisor and the third person, generally resulting from the sale of property belonging to the third person, and by a tripartite agreement the purchaser undertakes, as a part of the consideration, to pay to the plaintiff a debt owed to him by the third party. In Massachusetts, it has been expressly held that such an oral promise is within the statute, on the ground that the principal and immediate object of the transaction was not to benefit the promisor; Furbish v. Goodnow, 98 Mass. 296; Curtis v. Brown, 5 Cush. 488. See "leading purpose" rule, infra. In all the other States, though upon different grounds, such oral promises are held to be valid; in New York, on account of the consideration enuring to the benefit of the promisor; in other States, because it is only another method of paying the promisor's own debt; while in Pennsylvania and Vermont the promisor's debt to the third person is treated as a fund. See Olmstead v. Greenly, 18 John. 12; Gold v. Phillips, 10 Id. 411; Farley v. Cleveland, 4 Cow. 432; Ellwood v. Monk, 5 Wend. 235; Cailleux v. Hall, 1 E. D. Smith 5; Stilwell v. Otis, 2 Hilton (N. Y.) 148; Wait v. Wait's Executors, 28 Vt. 350; Whitcomb v. Klephart, 50 Penn. St. 85; Clymer v. De Young, 54 Penn. St. 118; Nelson v. Hardy, 7 Ind. 364; Lucas v. Payne, 7 Cal. 92. See also Fullam v. Adams, 37 Vt. 391; Mallory v. Gillett, 21 N. Y. 412.

Creditor's right to sue on promise to debtor. — In the class of cases last considered, the creditor was a party to the agreement by which the defendant undertook to pay the third person's debt. In most of the United States it is held that the

creditor may sue on a promise made to the debtor. Nearly all the adjudicated cases on this subject are confined to promises to the debtor made in consideration of property purchased by the promisor of the third person, and in Pennsylvania it is the application of the "funds" rule which is said to prevent the operation of the statute; Maule v. Bucknell, 50 Penn. St. 39; Townsend v. Long, 77 Penn. St. 143; Justin v. Tallman, 86 Penn. St. 147; and in that State the statute is held to apply, unless it is strictly one to pay out of the fund; Shoemaker v. King, 40 Penn. St. 107. By many courts and text-writers, however, the principle of these cases is said to be that the statute does not apply to promises made to the debtor; and Mr. Browne explains them on the principle that the creditor's right of action depends upon a promise implied by law, and is therefore without the operation of the statute: Browne on the Statute of Frauds, § 166, a. The apparently insuperable objection to either of the last mentioned grounds of decision seems to be that they must lead inevitably to the anomaly that the creditor is allowed to sue on an oral promise made to the debtor, while if made directly to himself this promise would have been inoperative. See Green v. Estes, 82 Mo. 337 (1884), in which case this anomaly seems to have been accepted by the court. The Pennsylvania doctrine, therefore, seems to be the sound one, that the creditor's right to sue upon an oral promise to the debtor is confined to those cases where the promise would have been binding if made to himself, to wit: where the defendant is in receipt of funds of the debtor. On whatever ground, however, their decisions may be based, most of the courts of this country admit the creditor's right of action; Wood v. Moriarty, (R. I.) 9 At. Rep. 427; Barker v. Bucklin, 2 Denio (N. Y.) 45; Berry v. Doremus, 30 N. J. L. 399; Rabbermann v. Wiskamp, 54 Ill. 179; Maxwell v. Haynes, 41 Me. 559; Johnson v. Knapp, 36 Ia. 616; Mason v. Hall, 30 Ala. 599; Mitchell v. Griffin, 58 Ind. 559; Welch v. Kenny, 49 Cal. 49; Besshears v. Rowe, 46 Mo. 501; Sweatman v. Parker, 49 Miss. 19; Harris v. Young, 40 Ga. 65; Meyer v. Hartmann, 72 Ill. 442; Balliett v. Scott, 32 Wisc. 174; Buchanan v. Padleford, 43 Vt. 64; Lawrence v. Fox, 20 N. Y. 268; Spann v. Cochran, 63 Tex. 240 (1885). But see Halstead v. Francis, 31 Mich. 113; Clapp v. Lawton, 31 Conn. 95; Packer v. Benton, 35 Conn. 343. It has never been expressly decided in Massachusetts whether the defendant's oral promise to the debtor could be enforced by the creditor; but apart from the statute it seems that it might be enforceable on the ground of a fund, notwithstanding the plaintiff was a stranger to the promise; Carnegie v. Morrison, 2 Met. 381; Frost v. Gage, 1 Al. 262; Putnam v. Field, 103 Mass. 556. But see Furbish v. Goodnow, 98 Mass. 296.

"New consideration" rule.— In the earlier decisions of this country, in which the dicta of English judges were cited as authority, there was a strong disposition to make the character of the consideration of the promise the crucial test in deciding whether or not oral collateral undertakings were within the operation of the statute of frauds. This tendency of the early cases finds its ablest expression in the language of Chancellor Kent (then chief justice), in the celebrated case of Leonard v. Vredenburgh, 8 Johns. 28. The definition of his third class of cases is, "When the promise to pay the debt of another arises out of some new and original consideration of benefit or harm, moving between the newly contracting parties." Such cases, he said, are not within the statute of frauds. See also the language of Savage, C. J., in Farley v. Cleveland, 4 Cow. 432.

In the State of New York, the rule thus laid down has been so far modified as to confine promises without the statute to those cases where the consideration moved directly to the promisor; Mallory v. Gillett, 21 N. Y. 412; but the influence of Chancellor Kent has been so great that the character of the consideration still seems to be treated by most of the judges in that State as the true test. Thus in Prime v. Koehler, 77 N. Y. 91 (1878), it was held that an oral promise to the mortgagee by the purchaser of an equity of redemption, who had not assumed the mortgage, to pay the mortgage debt, in consideration of forbearance to foreclose for a certain number of days, was without the statute, because there was a new consideration moving from the promisee to the promisor. See also White v. Rintoul, 49 Super. Ct. (N. Y.) 421 (1883); Morgan v. Woodruff, 12 Daly (N. Y.) 207 (1883); McCraith v. Mohawk Valley Bank, 104 N. Y. 414. In a few other States, the doctrine of a new consideration, originally adopted on the authority of Leonard v. Vredenburgh, seems to have continued to be law, even down to the present day. It has never been held, however, that mere forbearance to sue was alone sufficient to take an oral promise out of the statute; Chapline v. Atkinson, 45 Ark. 67 (1885); Wright v. Smith, 81 Va. 777 (1886); Lookout Mountain Railroad v. Houston, 85 Tenn. 224 (1886). But in England and most of the States of this country, this doctrine has, of late years, met with little favor. See Fitzgerald v. Dressler, 7 C. B. N. S. 374, cited supra; Maule v. Bucknell, 50 Penn. St. 39; Ames v. Foster, 106 Mass. 400. And all the modern text-writers are agreed that the true test is not the character of the consideration; and that, whatever the consideration, an oral guaranty is within the statute unless the promise be in substance to pay the promisor's own debt, or at least to pay out of property or funds furnished to him by the third person for the purpose.

"Leading purpose" rule. — The "leading purpose" rule, which has figured so prominently of late years in the decisions of our courts, seems to be the legitimate outgrowth and successor of the "new consideration" rule, as limited to promises the consideration of which moves to the promisor. We find its origin in some of the early English cases, in which it is laid down that, where the leading object and purpose of the contract is to benefit the promisor, the statute does not apply, although the payment of the debt of a third person may be incidentally involved. This doctrine seems, in many respects, to be as objectionable as the "new consideration" rule, and it is not strange that the courts which have adopted it as a test are in serious conflict as to the extent of its application. Massachusetts, where the court has been generally supposed to be most deeply committed to this rule, it is confined within the narrowest possible bounds, being practically limited, it would seem, to those cases where the leading purpose is the abandonment of a lien which enures to the benefit of the promisor's property; Furbish v. Goodnow, 98 Mass. 296; Ames v. Foster, 106 Mass. 400; Wills v. Brown, 118 Mass. 137; Richardson v. Robbins, 124 Mass. 105. But see Fears v. Story, 131 Mass. 47. By other courts this rule has been applied almost as broadly as the "new consideration" rule, and the result has been practically that very nullification of the statute deprecated by Chief Baron Pollock, in Mallet v. Bateman, L. R. 1 C. P. 163, ubi supra. Thus in Emerson v. Slater, 22 How. 28, which is a leading case on this subject, the benefit to the defendant consisted in enabling the third person, a railroad corporation, with which the defendant had a contract for the furnishing of

railroad iron, to continue the construction of its road. See also Graham v. Mason, 17 Ill. App. 399 (1885); Chapline v. Atkinson, 45 Ark. 67 (1885). So in Lookout Mountain Railroad v. Houston, 85 Tenn. 224 (1886), the defendant promised orally to assume all debts of a railroad company and of a previous contractor, in consideration of his being employed to complete the road, and his promise was held without the statute. So it has been held under this principle that an oral promise by a widow to pay debts of her deceased husband, in consideration of receiving continued credit from the plaintiff, is without the statute; Muller v. Riviere, 59 Tex. 640 (1883). But see Pfeiffer v. Adler, 37 N. Y. 164; Ruppe v. Peterson, S. C. Mich. Nov. 3, 1887, contra. So in White v. Rintoul, 49 Super. Ct. (N. Y.) 421 (1883), it was held that an oral promise by one of two creditors to pay the debt due the other creditor in consideration of forbearance to sue, the purpose being to enable the defendant to collect his own debt the more readily, was valid. So in Whitehurst v. Hyman, 90 N. C. 487, the consideration of the promise was the forbearance of the plaintiff to attach property belonging to the defendant as the third person's property. A common class of cases to which this principle has been held to apply by a few courts is where the owner of a building promises to pay a sub-contractor in consideration of continued services for the contractor on the defendant's property. As has been already seen, the better and almost universally accepted rule is that if the contractor remain liable the defendant's promise is within the statute. But it has been held in several cases that, since the inducement to the promise is a benefit to the promisor, the statute does not apply; Fitzgerald v. Morissey, 14 Neb. 198 (1883). But see Morissey v. Kinsey, 16 Neb. 17 (1884); Kutzmeyer v. Ennis, 3 Dutch. (N. J.) 371; and it seems that if the leading purpose rule be sound it must lead to the results reached in most of the cases above cited.

Guaranties by factors in consideration of del credere commission.—It is now perfectly well settled, both in England and in this country, that contracts of guaranty by a factor under a del credere commission are not within the statute of frauds. This was first decided to be the law in Swan v. Nesmith, 7 Pick. 220. This case was followed in the celebrated case of Wolff v. Koppel, 5 Hill 458, though the reasons assigned by Mr. Justice

Cowen were very different from those on which the Massachusetts adjudication was based. The authority of these decisions was afterwards recognized in England in Couturier v. Hastie, 8 Ex. 40 (1852). See also Wickham v. Wickham, 2 Kay & J. 478; Sherwood v. Stone, 14 N. Y. 267; Bradley v. Richardson, 23 Vt. 720; Suman v. Inman, 6 Mo. App. 385; Schell v. Stephens, 50 Mo. 33; Sheldon v. Butler, 24 Minn. 575; Rowland v. Bull, 5 B. Mon. 146; Smock v. Brush, 62 Ind. 156. The grounds of decision laid down by the courts and textwriters are various. It is sometimes said that a contract of guaranty under a del credere commission is in effect a purchase of the goods by the factor, and that he is liable in the first instance. This theory, however, is plainly untenable, and has received but little favor. Then it is said that such guaranties are to be classed under the "new consideration" rule or the "leading purpose" rule, by reason of the increased commission; but the unsatisfactory character of these tests has already been considered. In Wolff v. Koppel, cited supra, it is said that such a guaranty is merely an extension of the contract implied by law that the factor will exercise a reasonable degree of care towards the selection of responsible customers. See also the opinion of Baron Parke in Couturier v. Hastie, supra. The principle favored by Mr. Throop is that such promises are not within the statute because at the time the contract is made "the other person" to whose liability the defendant's promise is to be collateral is uncertain. Throop on the Validity of Verbal Agreements, § 605. It seems, however, that this class of cases must be treated as standing on their own footing; and, whatever the true principle on which they may depend, the validity of such oral promises is now definitively settled by judicial decision beyond all legal controversy.

PRICE v. THE EARL OF TORRINGTON.

TRIN. 2 ANNE. - CORAM HOLT, C. J., AT GUILDHALL.

[REPORTED SALKELD, 285.] (a)

In an action for beer sold and delivered, in order to prove the delivery, a book was put in, containing an account of the beer delivered by the plaintiff's draymen, and which it was the duty of the draymen to sign daily. The drayman who had signed the account of beer delivered to the defendant being dead, the book was admitted in evidence on proof of his handwriting.

THE plaintiff being a brewer, brought an action against the Earl of *Torrington* for beer sold and delivered, and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names, and that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery; otherwise of the shopbook itself singly, without more (b).

The books supply repeated instances in which the entries of a deceased person, contrary to his own interest, have been, after his death, received as evidence of the facts stated by him in those entries. But the decision in the principal case seems hardly to range itself within that class of authorities, for, as remarked by Mr. Phillipps, in his "Law of Evidence," such a declaration by a tradesman's servant as that made by the drayman in *Price v. Lord Torring-*

⁽a) See Higham v. Ridgway, post, (b) Sal. 690; ib. 283. Mod. cases, vol. ii., and 7 Jac. I., c. 12. 264; 2 Lord Raym. 837.

ton is clearly distinguishable from entries in the book of a receiver, who, by making a gratuitous charge against himself, knowingly against his own interest, and without any equivalent, repels every supposition of fraud. A disposition to commit fraud would have tempted him to suppress altogether the fact of his having received anything, or to misrepresent the amount of the sum, but not to misstate the ground or consideration upon which it was received; that is, not to misstate the only fact sought to be established by the proposed evidence. the other hand, the declaration of the tradesman's servant is given in evidence to prove the fact of delivery, and as he gives the account not against his own interest, which is some security for the truth of the statement in the other case, the probability of his account being true or false is neither greater nor less than the probability of his being honest or dishonest, which is nothing more than may be said of every case of hearsay. The circumstance of his thereby acknowledging the receipt of goods, which, it may be said, would be evidence in an action against him, seems to amount to little or nothing. It was the least he could say. To have said nothing at all would, as he must have known, necessarily lead to inquiry.

Price v. Lord Torrington falls within the class of cases thus described by Mr. Justice Taunton. "A minute in writing, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances, which render it probable that the fact occurred, is admissible in evidence." Doe v. Turford, 3 B. & Ad. 898. that case a landlord instructed B. to give the defendant notice to quit, and B. communicated it to his partner P., who having prepared three notices to quit, two of them to be served on other persons, and three duplicates, went out, returned in the evening, and delivered to B. three duplicates, one of which was a duplicate of the notice to the defendant indorsed by P. It was proved that the other notices were delivered as intended, that the defendant had afterwards requested not to be compelled to quit, and that it was the invariable practice of the clerks of B. and P., who usually served the notices to quit, to indorse, on a duplicate of such notice, a memorandum of the fact and time of service. The duplicate in question was so indorsed; and it was admitted, after the death of P., to prove the service of the third notice on the defendant.

The former cases on this subject will be found cited and discussed in *Doe* v. *Turford*; it will therefore be unnecessary to advert to them at length in this note. See *Pitman* v. *Maddox*, 2 Salk. 690; *Hagedorn* v. *Reid*, 3 Camp. 379; *Champneys* v. *Peck*, 1 Stark. 404; *Pritt* v. *Fairclough*, 3 Camp. 305, *et notas*. In *Poole* v. *Dicas*, 1 Bing. N. C. 649, a bill became due and was left with a notary to demand payment; M. the notary's clerk went out, returned, and, in one of the notary's books into which the bill had been previously copied, wrote in the margin *no effects*; another clerk made a similar entry in another book from M.'s dictation; all this was done in the regular course of business: the court held that after the death of M. the entry made by him was admissible to prove the dishonor of the bill. "We think it," said Tindal, C. J., "admissible, on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business, by a person who had no interest to misstate what had occurred."

Mr. Justice Parke, in delivering his judgment, in *Doe* v. *Turford*, remarks a distinction between the admissibility of an entry of this description, and of an entry admitted in evidence because against the interest of the party making it. "It is to be observed," said his lordship, "that in case of an entry falling under the rule as being an admission against interest, proof of the handwriting of the party and his death is enough to authorize its reception; at whatever

time it was made, it is admissible. But in the other case, it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry." 3 B. & Ad. 898 [and see the judgments in *Turner v. Hutchinson*, 3 L. T. N. S. 815].

An entry admissible after the maker's death because made in the course of business is, however, evidence of those things only which, according to the course of that business, it was the duty of the deceased person to enter [whereas, if admissible as against interest, it would be evidence of any other things contained in the declaration, and substantially connected with the same subjectmatter: R. v. The Churchwardens and Overseers of Birmingham, 1 B. & S. 763, 31 L. J. M. C. 63; R. v. Governors and Guardians of Poor of Exeter, 38 L. J. M. C. 126, L. R. 4 Q. B. 341]. In Chambers v. Bernasconi, 1 Tyrwh. 342, 4 Tyrwh. 531, in error, a distinction was engrafted upon the rule laid down in Doe v. Turford. In that case it became material to ascertain the place at which one Chambers had been arrested. The under-sheriff of Middlesex, being called, produced the writ, and stated that by the course of his office the bailiff making an arrest was required immediately afterwards to transmit to the office a memorandum or certificate of the arrest, and that for the last few years an account of the place where the arrest took place had also been required from him; it was then proved that the bailiff who arrested Chambers was deceased, and the following memorandum in his handwriting, taken from the files of the office, was tendered in evidence to prove the place where he made the arrest:

"9 November, 1825.

"I arrested A. H. Chambers the elder only in South Molton Street, at the suit of William Brereton. "Thomas Wright."

The memorandum was held by the Court of Exchequer inadmissible for the purpose for which it was offered, and afterwards in the Exchequer Chamber, whither the point was carried by a bill of exceptions. "The ground," said Lord Denman, C. J., delivering the judgment of the Exchequer Chamber, "on which the attorney-general first rested his argument for the plaintiff in error was not much relied on by him, viz. that the certificate was an admission against the interest of the party making it, because it renders him liable for the body arrested. He had recourse to a much broader principle, and laid it down as a rule that an entry made by a person deceased, in the course of his duty, where he had no interest in stating an untruth, is to be received as proof of the fact stated in the entry, and of every circumstance therein described which would naturally accompany the fact itself. The discussion of this point involved the general principles of evidence, and a long list of cases determined by judges of the highest authority, from that of Price v. Torrington, before Holt, C. J., to Doe d. Patteshall v. Turford, recently decided by Lord Tenterden in the Court of King's Bench. After carefully considering, however, all that was urged, we do not find it necessary, and therefore we think it would not be proper, to enter upon that extensive argument; for as all the terms of the legal proposition above laid down are manifestly essential to render the certificate admissible, if any one of them fails the plaintiff in error cannot succeed; and we are all of opinion that whatever effect may be due to an entry made in the course of any office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting then for the sake of argument that the entry tendered was evidence of the fact, and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is

not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done." See Lloyd v. Wait, 1 Phil. 61.

It is difficult, in perusing this case, Chambers v. Bernasconi, to avoid remarking, that, although professing to steer wholly clear of the doctrine promulgated in Doe v. Turford, it still seems hardly reconcilable in its facts with that decision; for it was proved in Chambers v. Bernasconi, and is indeed stated in the judgment of the Lord Chief Justice, that the course of the office of the sheriff of Middlesex is, to require a return in writing of the arrest, and of the place where it is made, under the hand of the officer making it. Now it certainly, in ordinary parlance, would be said to be the officer's duty to comply with the course of the office by returning the place of arrest; had he refused to do so he would probably have been discharged. And it is difficult to see how an entry which he was required to make, and had not the choice of omitting. could be more collateral to his duty than the entry of the service of the notice to quit was to that of the person making it in Doe v. Turford; and it seems obvious that the entry of the place of arrest might prove of utility to the officer's employer, the sheriff; since, if an action of trespass were brought against him by the party arrested, he would, in order to his defence, be obliged to show that he arrested him within the county: so that a knowledge of the precise spot on which the caption took place might be very material and useful to him. But, whatever may be our opinion as to the possibility of reconciling Chambers v. Bernasconi with Doe v. Turford, it may be safely stated, that the former case has not shaken the general doctrine promulgated in the latter, since the attention of the Court of Common Pleas was drawn to both in Poole v. Dicas, 1 Bing. N. C. 649, where the authority of Doe v. Turford was expressly recognized; and Tindal, C. J., and Parke, J., both stated that the decision in Chambers v. Bernasconi turned wholly on the circumstance that the officer had gone beyond the sphere of his duty in making an entry of the place of arrest. See Baron de Rutzen v. Farr, 4 A. & E. 53, in the report of which there seems to be some mistake [and the observations of Pollock, C. B., in Milne v. Leisler, 7 H. & N. 786]. See also Marks v. Lahee, 3 Bing. N. C. 420; Clark v. Wilmot, 1 Younge & C. N. C. 53, corrected 2 id. 259 n.; Pickering v. Bishop of Ely, 2 id. 249; and Lloyd v. Wait, 1 Phil. 61. In Doe d. Graham v. Hawkins, 2 Q. B. 212, the account admitted was written by a clerk (still living and not called) of the deceased officer, and it had been recognized by the officer as his. In Davis v. Lloyd, 1 Car. & K. 275, it appeared to be the practice of the Jews that circumcision should take place on the eighth day after the birth, and that it is the duty of the chief rabbi to perform the rite, and to make an entry thereof in a book kept at the synagogue. The death of the chief rabbi being proved, such an entry was offered in evidence to show the age of a Jew, but Lord Denman, after consulting Patteson, J., rejected it, probably on the ground that the duty of the chief rabbi did not spring from any relation recognized by law.

In Brain v. Preece, 11 M. & W. 773, it was the course of business for H., one of the workmen at a coal-mine, to give notice of the coals sold to the foreman Y., who, not being able to write, employed another man to enter the sales, and the entries were afterwards read over to him. H. and Y. being dead, the entries were held not to be evidence, apparently on the ground that they were not made by a person having direct knowledge of the facts or a person employed by him; and Lord Abinger, C. B., observed, that "as regards the case of Price v. Lord Torrington, it is better to adhere to that case as it stands, and not to give any extension to it." ["The rule to be collected from all the cases is, that it is an essential fact to render such an entry admissible, that not only it should

be made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates and then to make a record of it," per Blackburn, J. Smith v. Blakey, L. R. 2 Q. B. 326. And see The H. Coxon, 3 P. D. 156; Polini v. Gray, 12 C. H. D. 411, 49 L. J. Ch. 41, and in H. L. sub nom. Sturla v. Freccia, 5 App. Cas. 623; Massey v. Allen, 13 Ch. D. 558, 49 L. J. Ch. 76; Trotter v. Maclean, 13 Ch. D. 574. However, in Rawlins v. Rickards, 28 Beav. 370, an entry made by a deceased solicitor in his books relating to a deed prepared by him and executed by a deceased person was admitted as evidence that the deed had been executed. In the Dundonald Peerage Case an entry in a deceased solicitor's books, and in his handwriting, recording an interview with Lord Dundonald upon a particular day, was admitted as evidence of the fact that his lordship had been in London at that date. See at pp. 112 & 137 of the Minutes of Evidence.] The declarations of a deceased witness to a deed tending to show that he was concerned in forging it are inadmissible, Stobart v. Dryden, 1 M. & W. 615; but in that case it was not argued that they were declarations against the interest, nor could that have been successfully argued according to the Sussex Peerage Case, 11 Cl. & Fin. 85. For the law as to admissibility of statements against the interest of the person making them, see Higham v. Ridgway, vol. ii., and the note. And as to parol statements being equally admissible with written ones, the same note, Stapylton v. Clough, 2 E. & B. 293; Edie v. Kingsford, 14 C. B. 750 [and see Turner v. Hutchinson, 3 L. T. N. S. 815; R. v. Birmingham (Churchwardens of), 1 B. & S. 763, 31 L. J. M. C. 63].

A party's own books of account and original entries are now, in most, if not all, of the United States, received as evidence of a sale and delivery of goods to, or of work done for, the adverse party. This practice is sanctioned in some jurisdictions by the decisions of the courts; in others by express legislative enactment. But, even in those States where it is admitted by force of the common law, it is regarded as a departure from the old common-law rule that a party shall not make evidence in his own favor, and, if we may judge from the language of the courts, is considered as of questionable policy. The reason for its introduction has never been placed, by any court, on higher ground than that of necessity. For, in view of the number and frequency of transactions of which entries are daily required to be made, the difficulty and inconvenience of making formal common-law proof of each item would be very great. To insist upon it, therefore, would either render a credit system impossible or leave the creditor remediless. But where a course of dealing between parties is shown to have existed, a degree of credit, more or less, will naturally attach to the registration, by the proper person, in the proper book kept for such purpose, in

the usual course of business, of such transactions as occur between them. The admission of books of account in evidence, therefore, under proper restrictions and limitations, is not calculated to produce injurious consequences. But, inasmuch as the situation and circumstances of trade are gradually becoming such as very much to diminish the reason of the departure from the common-law rule, the courts in some of the States are inclined to restrain rather than enlarge the exception itself; Sickles v. Mather, 20 Wend. 72; Larue v. Rowland, 7 Barb. 107; Dunn v. Whitney, 1 Fairf. 9.

Preliminary proof. — In order to render books of account competent evidence, a proper preliminary foundation must be laid by proving that the party made the entries himself; that some of the articles charged have been delivered; that he has no receipt or other admission of the party to be charged that the articles were received; that the books produced are the account books kept in the business in which he is regularly engaged; that the entries were made in the usual course of business at or about the time the transactions entered took place, and before the facts can be supposed to have passed from his recollection; and that he keeps fair and honest accounts. This last requirement must be proved either by the suppletory oath of the party himself, or by the testimony of those who have dealt and settled with him.

Clerks. — If the entries were made by a clerk who is living and is within the jurisdiction of the court where the cause is pending, his testimony must accompany them, and if he is not called to explain under what circumstances the entries were made, and no sufficient reason is assigned for the omission, it will be error to admit the entries; Stiles v. Homer, 21 Conn. 507, and cases cited; Paine v. Sherwood, 21 Minn. 225; Gould v. Conway, 59 Barb. 355; McGoldrick v. Traphagen, 88 N. Y. 334; Ridgway v. Farmer's Bk., 12 S. & R. 256; Waggeman v. Peters, 22 Ill. 42; Dodson v. Sears, 25 Ill. 513; Lord v. Siegel, 5 Mo. App. 582. And if the articles were delivered by a clerk, that fact must be proved by him; Dunn v. Whitney, 1 Fairf. (Me.) 9. It must be made to appear that the clerk who made the entries was in the service of the party at the time the transactions took place; Vance v. Fairis, 2 Dall. 217. In Delaware a contrary practice seems to prevail, and it is there held that the plaintiff may prove his books of original entry whether kept by

him or by a clerk or agent; Webb v. Pindergrass, 4 Harrington 439. But if the clerk be dead, his entries, on proof of his handwriting, are admissible; Ocean Bank v. Carll, 9 Hun 239; Brewster v. Doane, 2 Hill 537; Sheldon v. Benham, 4 Hill 129; Merrill v. Ithaca, &c., R. R., 16 Wend. 595, and cases cited; Welsh v. Barrett, 15 Mass. 380; Parker v. Nickerson, 137 Mass. 487: Bland v. Warren, 65 N. C. 372; Sypher v. Savery, 39 Iowa 258; Martin v. Fyffe, Dudley (Ga.) 16. So, if he resides and is out of the State; Chaffee v. United States, 18 Wall. 541: Vinal v. Gilman, 21 W. Va. 301, and cases cited. The temporary absence of the clerk or book-keeper from the State can scarcely be considered a sufficient cause to dispense with his production, for, if this were so, such absence might readily be brought about for the very purpose of obtaining the advantage of using such entries without his accompanying statement and explanation. It was, however, considered sufficient to justify the reading of the entries, on proof of his handwriting, in Hay v. Kramer, 2 W. & S. 137. On the other hand, it was held in New York that nothing short of his death, not even his permanent absence beyond the jurisdiction of the court, will excuse the production of the person who made the entries, and if they be made by a sub-clerk he must be produced or his death shown: Merrill v. Ithaca, &c., R. R., 16 Wend. 595. But the rule extends only to a clerk who makes the entries and to such entries as he has actually made. A man about a factory who attends no farther to sales than the mere delivery of goods and noting the fact for a temporary purpose upon a slate is not such a clerk as is necessary to be called to establish the entries of his principal; Sickles v. Mather, 20 Wend. 72. If the entry clerk, however, has no knowledge of the correctness of the items, but made them as they were furnished by another, it is essential that the person furnishing them should testify to their correctness; Stettauer v. White, 98 Ill. 72; Gould v. Conway, supra.

Partners. — In the case of partners, where one delivers the goods, and the other makes the entries upon the books, it is held, in Massachusetts, that the oaths of the two may accompany the books and thus render them admissible even though the party delivering the goods made no memorandum or charge of them; Harwood v. Mulry, 8 Gray 250; Barker v. Haskell, 9 ('ush. 218. The same rule was followed in a case where the wife made the charges on the book but knew nothing of the

sale or delivery by her husband; Littlefield v. Rice, 10 Met. 287; Morris v. Briggs, 3 Cush. 342. In Minnesota the court went further, and in Webb v. Michener, 32 Minn. 48, held that where the account books of a partnership were offered in evidence containing entries some of which were made by the absent partner, and some by the partner by whose oath the books were verified (both being authorized to make the entries), the books were properly admissible as primâ facie evidence, a course of dealing between the parties having been shown, though the absent partner chiefly made the sales to the defendant.

Entries must be in regular course of trade. - The books of account should contain such transactions only as occur in the regular course of the business in which the party offering them is engaged; Smith v. Law, 47 Conn. 431; Harbison v. Hawkins, 32 P. F. Smith 142; Vieths v. Hagge, 8 Iowa 163; Karr v. Stivers, 34 Id. 123; Lyman v. Bechtel, 55 Id. 437; Moody v. Roberts, 41 Miss. 74; Chicago R. R. v. Provine, 61 Miss. 288; Baldridge v. Penland, 4 S. W. Rep. 565. For the purpose of this species of evidence is to afford proof of numerous small transactions of which there can be no independent recollection, and it will not be permitted to extend to transactions of which other and better evidence can be given. An entry therefore of money lent, or a magistrate's charges for taking a deposition, or a commission on the sale of a house or vessel, are not such transactions as, in the usual course of business, are matter of book account; Vosburgh v. Thayer, 12 Johns. 461; Harbison v. Hawkins, supra; Fenn v. Early, 113 Penn. St. 264; Winsor v. Dillaway, 4 Met. 221. A course of dealing between the parties must also be shown, and a book containing a single charge only against the defendent is inadmissible. A cash loan is generally secured by a note; magistrate's fees are regulated by law, and a single isolated transaction can, as a rule, be recalled by the unaided memory. Therefore a charge of "a bay horse, \$45" needs confirmation of the sale and price by other evidence, for a horse is not an article of ordinary merchandise: Townsend v. Townsend, 5 Harrington 125. An early case in Vermont, Ames v. Fisher, Brayton 39, held the same view, and rejected a single charge of \$60 for a spinning jenny. But the same court, in Field v. Sawyer, reported in the same book and on the same page as the latter case, admitted a single charge of 141 gallons of gin, and attempted to distinguish it from the

former case on the ground that there, from the nature of the article, there could be no standard for the price, and the defendant was thereby exposed to fraud. Field v. Sawyer was followed in Kingsland v. Adams, 10 Vt. 201, where a single charge of forty-five dollars for a horse sold was admitted. Where the entry by which it was sought to charge the defendant was made in an old account book in which no other entry had for ten years been made, it was rejected; Kibbe v. Bancroft, 77 Ill. 18; Ruggles v. Gatton, 50 Ill. 412; Ingersoll v. Banister, 41 Id. 388.

Intent to charge. — The entries must be made with an intent to charge the defendant, and if the intent is disproved they are inadmissible. Moody v. Roberts, 41 Miss. 74. Where the defendant testified, "I did not intend to charge Mr. Bollman anything at the time, although I made the entry provided his conduct toward me should be what was right," his entries were excluded; Walter v. Bollman, 8 Watts 544. The invoice book of an agent, or a book of the defendant containing an account of the number of days the plaintiff worked for him, are not such entries as are made with the intent of charging, and are therefore inadmissible; Cooper v. Morrel, 4 Yeates 341; Summers v. M'Kim, 12 S. & R. 405; Seligman v. Ten Eyek, 53 Mich. 285; Masters v. Marsh, 19 Neb. 458. The book of the party must be kept in such a way as to show of itself a charge against the adverse party and the nature of that charge, so that the book with the oath of the party as to the time of the entry. and the other particulars required in such cases, will show the nature of the claim without further evidence from the party to interpret his books. Swain v. Cheney, 41 N. H. 232; Cummings v. Nichols, 13 N. H. 420. In Van Every v. Fitzgerald, 21 Neb. 36, the court say: "The book in this case does not, nor does it purport to, contain entries of charges against the plaintiff or of dealings with him. . . . If it appeared on the face of this book that the object of keeping the account was to charge the days' works of these men respectively to the plaintiff, I think under the authorities that it would be admissible in evidence." Pollard v. Turner, 35 N. W. Rep. 192. There must be a right to charge when the service is done or the goods delivered. Therefore charges for anything done or delivered under a supposed special contract, but which afterwards becomes matter of account by operation of law in consequence of the rescission of the contract, cannot be proved by the party's book; Merrill v. Ithaca, etc., R. R., 16 Wend. 594. See Morse v. Potter, 4 Gray 292; Lawhorn v. Carter, 11 Bush 7.

Entries must be original and contemporaneous. - Such entries only as are shown to be original and made contemporaneously with the transaction to which they relate are admissible in evidence. The time within which they should be made has been well and clearly stated by Sergeant, J., in Jones v. Long, 3 Watts 325. "The entry need not be made exactly at the time of the occurrence; it suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived, unimpaired. The law fixes no precise instant when the entry should be made. If done at or about the time of the transaction, it is sufficient." While this rule has been substantially followed in all the States, it has been construed and interpreted with a greater degree of strictness in some than in others. In Pennsylvania, where the rule originated, a very strict construction has been put upon it, and it is held that the entries should be made at the close of the day when the transactions occurred, or during the succeeding day, Walter v. Bollman, 8 Watts 544.

Entries, for the reason that they were not seasonably made, were excluded in the following cases: Vance v. Feariss, 1 Yeates 321, where they were made some months after the transaction; Kessler v. M Conachy, 1 Rawle 441, where a week elapsed; Forsythe v. Norcross, 5 Watts 432, where there was a delay of five or six days; and Groff's Estate, 14 Phila. 306, where there was a probability that the entries had been delayed for only two or three days. In Massachusetts, on the other hand, it was said that a delay of six days in making the entries would not, of itself, render the books incompetent: Kent v. Garvin, 1 Gray 148. See also Taggart v. Fox, 11 Daly 159; McGoldrick v. Traphagen, 88 N. Y. 334; Sickles v. Mather, 20 Wend. 72; Stroud v. Tilton, 4 Abb. App. Dec. 324; McGoldrick v. Wilson, 18 Hun 443; Ladd v. Sears, 9 Ore. 244.

It is held to be no objection to the competency of a party's book that the entries therein were transcribed from a slate or memorandum book in which they were first entered for a temporary purpose, although the entries on the slate or memorandum were made by a person other than the party who copied

them on to the book. In such cases the entry of the charges in the regular day-book is deemed to be the first and original entry; Kent v. Garvin, 1 Gray 148; Webb v. Michener, 32 Minn. 48. Therefore where the plaintiff, who was a blacksmith, kept a slate in his shop on which he set down all his charges as they accrued, the defendant's among the rest, which he afterward transcribed into a book, it was admitted as a book of original entries; Faxon v. Hollis, 13 Mass. 427; Whitney v. Sawyer, 11 Gray 242; Hall v. Glidden, 39 Me. 445; Pillsbury v. Locke, 33 N. H. 96; Jeffries v. Urmy, 3 Houst. (Del.) 653; Redlich v. Bauerlee, 98 Ill. 134. In Pennsylvania the decisions have not been altogether harmonious regarding the admissibility of entries which have been transferred from a slate or memorandum. In Ogden v. Miller, 1 Browne 147, they were excluded, but in Ingraham v. Bockius, 9 S. & R. 285, and Jones v. Long, supra, they were admitted. In Forsythe v. Norcross, supra, the latter practice was approved, but the entries were rejected on another ground. A book containing partly original charges and partly transcribed charges is not for that reason any the less a book of original entries, or entitled to less credit; Ives v. Niles, 5 Watts 323. But an account book which is shown to have been purchased since the date of some of the items contained in it cannot be considered a book of original entries, nor can one in which the entries were prematurely made before the contract of sale was complete; Eberhardt v. Schuster, 10 Abb. New Cas. 374; Laird v. Campbell, 100 Penn. St. 159. A recent case in California, Roberts v. Eldred, 15 Pac. Rep. 16, went to some length in admitting a set of books which were made out from an old and unintelligible set by an expert who was employed by the referee in the case. But, inasmuch as the expert was originally employed by agreement of counsel, the case cannot be considered a strong authority for the practice.

Where laborers are employed in the prosecution of a work, and an account is kept in the regular course of business based upon daily reports of the foremen who have charge of the men and who, in accordance with their duty, report the time to another subordinate of the same common master, who, in his turn, enters the time as reported, the entries so made, with the evidence of the foremen that they made true reports, and of the person who made the entries that he made them correctly,

are admissible; Mayor of N. Y. v. Sec. Ave. R. R., 102 N. Y. 572.

Oath of party. — In most of the United States, in addition to the books of account, the suppletory oath of the person who made the entries is required to prove that the party's books are those in which the accounts of his regular business transactions are kept; that the services have been performed or the articles delivered to the defendant; that the entries were made at or about the time of the transaction; that they are the original entries, and that the sums charged have not been paid; Frye v. Barker, 2 Pick. 65; Kaiser v. Alexander, 144 Mass. 71; Miller v. Shay, 145 Mass. 162; Little v. Wyatt, 14 N. H. 23; Kessler v. M'Conachy, 1 Rawle 441; Poultney v. Ross, 1 Dall. 238; Ives v. Niles, 5 Watts 323; Fredd v. Eves, 4 Harrington 385; Cram v. Spear, 8 Ohio 494; Neville v. Northcutt, 7 Coldw. 294; Curran v. Witter, 31 N. W. Rep. 705; Riggs v. Weise, 24 Wisc. 545; Martin v. Scott, 12 Neb. 42; Burleson v. Goodman, 32 Tex. 229. In Little v. Wyatt, supra, the court say, "It is the book which is the evidence, and the party testifies in chief only to verify it. The party is not a witness who testifies to facts, and then appeals to the book in corroboration of his story; but the book is the source of information, and the party is limited to testifying that it is a true record." And in Cram v. Spear, supra, it is held that if the items are such as generally constitute the subject of book account, the quantity, quality, and delivery of the articles, if goods or chattels, or the services performed, if labor, may be proved by the oath of the party claiming by virtue of the book account. The better opinion seems to be that the plaintiff's oath and testimony must be taken in court, and cannot be given in a deposition or under a commission; Pike v. Blake, 8 Vt. 400. See Frye v. Barker, 2 Pick. 65; Nicholson v. Withers, 2 McCord 428; Spence v. Sanders, 1 Bay 119.

But a party will not be allowed to sustain his account by his own book and oath if it appear either by his book or his examination that the goods were delivered to a third person who might be produced as a witness; Webster v. Clark, 30 N. H. 245; unless there is evidence aliunde that the goods were so delivered on the authority of the defendant; Mitchell v. Belknap, 23 Me. 475. If the articles are of such bulk or weight that the person making the entries could not reasonably be sup-

posed to have delivered them without assistance, the presumption would arise that better evidence of the delivery might be produced. And it is for the judge to decide, upon an inspection of the items of the account, whether the articles charged could ordinarily have been delivered without the assistance of other persons, and admit or reject the testimony accordingly; Leighton v. Manson, 14 Me. 208. In this case the plaintiffs proposed to introduce their books and prove the sale and delivery of 355 pounds of beef in one item, and 360 pounds of beef in another, but the books were excluded on the ground that there was better evidence of the delivery; Dunn v. Whitney, 1 Fairf. 9.

In New York, in order to lay a foundation for the admission of books of account, it must, among other things, be proved that the plaintiff kept fair and honest books, and this is done by the testimony of those who have dealt and settled with him; Vosburgh v. Thayer, 12 Johns. 461. The party's own oath is neither required nor allowed; Sickles v. Mather, 20 Wend. 72; Larue v. Rowland, 7 Barb. 107. A book-keeper who has an account with his employer is a competent witness to testify that he settled his own accounts with his employer by his employer's books, and that he believes the books to have been honestly kept; McGoldrick v. Traphagen, 88 N. Y. 334. A similar practice seems to prevail in Illinois; Ingersoll v. Martin, 41 Ill. 388, and in New Jersey the party may give other evidence to corroborate his books; Ayres v. Van Lieu, 2 South. 765. If one who kept the books has since become insane, the entries may, on proof of his insanity and of his handwriting, be admitted with the suppletory oath of his guardian. And whether the degree of insanity in a particular case is such as to justify their admission is a question to be determined by the discretion of the presiding judge; Holbrook v. Gay, 6 Cush. 215.

Cross-examination. — After the party has testified in chief, he may be cross-examined fully by the opposite party, respecting the book to be placed in evidence and the entries therein, in which case he is entitled to give a full explanation of any matter concerning which he is cross-examined. The defendant, having cross-examined the plaintiff as to his book accounts, must take the disadvantages with the advantages, and must suffer him to explain his statements, whether or not upon other grounds he

is competent to testify. And the evidence thus adduced is not incompetent to be submitted to the jury, though the book of accounts be rejected; McIlvaine v. Wilkins, 12 N. H. 474; White's Estate, 11 Phila. 100; Fredd v. Eves, 4 Harrington 385. See Brickley v. Walker, 32 N. W. Rep. 773; Hannan v. Engelmann, 49 Wisc. 278; Wright v. Towle, 34 N. W. Rep. 578. If the entries are made by means of arbitrary characters, the signification of which is known only by persons of a particular trade or profession, the evidence of such other persons may be admitted as will explain the meaning usually attached to characters of that description; Eastman v. Moulton, 3 N. H. 156; Cummings v. Nichols, 13 N. H. 420. And a witness may testify as to entries made by him on the party's account books, although he has no independent recollection of the transactions so entered; Curran v. Witter, 31 N. W. Rep. 705.

Competency and sufficiency. — The books of original entries must be produced and submitted to the inspection of the court, whose duty it is to decide as to their competency. No mode is prescribed by law in which books of account are to be kept, and the question of competency therefore, in a particular case, must be determined by the appearance and character of the book, regard being had to the degree of education of the party, the nature of his employment, the manner of his charges against other people, and all the circumstances of the case; Cogswell v. Dolliver, 2 Mass. 217; Prince v. Smith, 4 Mass. 455; Whitney v. Sawyer, 11 Gray 242; Linnell v. Sutherland, 11 Wend. 568; Curren v. Crawford, 4 S. & R. 3; Thomas v. Price, 30 Md. 483; Moody v. Roberts, 41 Miss. 74. The same authorities hold, further, that the sufficiency and credibility of the entries are for the jury, and it is for the jury to say how much the entries prove; Ocean Bank v. Carll, 9 Hun 239; and in an action before a referee it is for him to determine the value of the books as evidence; McGoldrick v. Wilson, 18 Hun 443. The books are open to remark by the court, and are subject to the strictest scrutiny of the jury, and if there be any fraudulent appearance, such as gross alterations, or any suspicion of unfair dealing, they will be rejected; Eastman v. Moulton, 3 N. H. 156; Gale v. Norris, 2 McLean 469; Churchman v. Smith, 6 Whart. 146; Martin v. Fyffe, Dudley 16. Particular instances of irregularity and false charges may be proved, to discredit the books and to show them to be unreliable, and the party's

general character for honesty and veracity may be impeached; White's Estate, 11 Phila. 100; Gardner v. Way, 8 Gray 189, contra.

If, in any way, it appears that the account has been transferred to another book, as from the day-book to a ledger, such other book must be produced; Eastman v. Moulton, 3 N. H. 156; Prince v. Swett, 2 Mass. 569. But the ledger of a party, not being ordinarily a book of original entries, is not competent unless called for by the other party; Stetson v. Wolcott, 15 Gray 545; and if produced, and there be a day-book, the latter must also be produced; Cram v. Spear, 8 Ohio 494.

Copies. — As a rule, copies of entries in books of account are incompetent; Creswell v. Slack, 68 Iowa 110, and cases cited; Gale v. Norris, 2 McLean 469; Prince v. Smith, 4 Mass. 455. But under certain circumstances, as where the books have been lost or destroyed, secondary evidence is admissible: Holmes v. Marden, 12 Pick. 169. In Bell v. Keely, 2 Yeates 255, copies of the books of merchants residing abroad were admitted, the court saying: "They" (the books) "may be wanted at other places. True abstracts from the books only can be required, with the oath of the clerk who made the entries. Where he is dead, or cannot be procured, proof must be given of his handwriting, which must accompany the copies." In Deitz v. Regnier, 27 Kans. 94, the books of the banking-house of S. H. & Co., which became material in the cause, were in the State of Missouri, out of the jurisdiction of the court. Their production could not be compelled in Kansas, and as the books were not in the custody of the party offering the account in evidence, nor subject to the control of the party needing them, a copy was admitted; Shepard v. Giddings, 22 Conn. 282: Crawford v. Bank at Mobile, 8 Ala. 79; Vinal v. Gilman, 21 W. Va. 301; Philadelphia Bank v. Officer, 12 S. & R. 49; Ridgway v. Farmer's Bank, 12 S. & R. 256. In most of these cases, however, the originals were of a public or semi-public nature, and the public convenience and the necessity for their preservation required them to be kept in a safe place.

Charges must be specific.— The charges must be reasonably specific and particular, inasmuch as when received the books are *primâ facie* evidence both of the items charged and the price or value carried out; Corr v. Sellers, 100 Penn. St. 169; Nichols v. Haynes, 78 Id. 174. "A general charge for work

and labor of a mechanic, without any specification but that of time, cannot be supported by evidence of an entry on the book;" Corr v. Sellers, supra. Therefore, a bricklayer's charge of "190 days' work" was rejected; Lynch v. Petrie, 1 Nott & McC. 130. So three months' service, \$90, in one item, Henshaw v. Davis, 5 Cush. 145; an item of "four years' rent of certain marshes," Prince v. Smith, 4 Mass. 455; an item of "seven gold watches, \$308," Bustin v. Rogers, 11 Cush. 346, cannot be proved. This rule applies to physician's charges; Lance v. McKenzie, 2 Bailey 449; Hughes v. Hampton, 2 Treadw. 745. In Martin v. Fyffe, Dudley 16, a charge of "bills receivable to merchandise" was considered too general of itself to prove the sale and delivery of any particular goods, for from this it could not be known what one article among many classed under the head of merchandise was sold and delivered to the defendant; Baldridge v. Penland, 4 S. W. Rep. 565.

Collateral matters. — The plaintiff's books of account with his suppletory oath are incompetent to prove any fact collateral to the issue between the parties. They are therefore inadmissible to prove a promise of payment by the defendant, Somers v. Wright, 114 Mass. 171; or to prove the consideration of a promissory note, Rindge v. Breck, 10 Cush. 43; or that a person other than the defendant was indebted to the plaintiff, Woodes v. Dennett, 12 N. H. 510; Little v. Wyatt, 14 N. H. 23; or the promise of a third person to pay the debt, Poultney v. Ross, 1 Dall. 238; or a verbal order of a guardian to let his ward have clothes, Deas v. Darby, 1 Nott & McC. 436. As tending to show a license from the plaintiff to erect a dam, the defendant cannot offer his books in evidence to establish the fact that the plaintiff worked a day on the dam; Batchelder v. Sanborn, 22 N. H. 325. Nor is such evidence competent to show to whom credit was given when that fact is in issue; Keith v. Kibbe, 10 Cush. 35; Kaiser v. Alexander, 144 Mass. 71; Fiske v. Allen, 40 N. Y. Supr. Ct. 76; St. Philip's Church v. White, 2 Mc-Mullan 306. But a contrary doctrine has been held in Georgia; Dunlap v. Hooper, 66 Ga. 211, where the court say that the plaintiff's day-book and ledger are both admissible for the purpose of proving to whom the credit was given when the goods were bought, by showing to whom they were charged at that time. The Minnesota, New Jersey, and California decisions are

the same way. "The fact that the goods, the price of which is sued for, were charged on the plaintiffs' books of account to Thompson instead of defendant, while proper to be considered by the jury upon the question to whom was the credit given, was not decisive against the admissibility of the books in evidence." Its weight as evidence upon the question to whom credit was given was very properly left to the jury; Winslow v. Dakota Lumber Co., 32 Minn. 237; Scudder v. Wade, 4 N. J. Law 249; Hetfield v. Dow, 27 N. J. Law 440; Ross v. Brusie, 70 Cal. 465.

In Mifflin v. Bingham, 1 Dall. 272, McKean, C. J., expressed an opinion that the plaintiff's books of account might be offered to determine the collateral question whether, at a particular period, a third person was the defendant's debtor. The opinion was not, however, necessary to the decision of the cause, and was not acted on, and in a later case, Juniata Bank v. Brown, 5 S. & R. 226, where the books of account of the plaintiff were offered to prove that certain third parties had been partners, they were excluded as tending to prove a collateral matter. On an indictment for having obtained the signature of a person to a note by false pretences, it was held that the account books of the prisoner were not, of themselves, without other testimony, competent evidence of the state of the accounts between him and the prosecutor; The People v. Genung, 11 Wend. 18. Nor are entries upon the books of a railroad company made by one who was an agent of the railroad company and still living, though absent from the State, competent evidence of the facts therein set forth upon the trial of a third person for perjury; State v. Thomas, 64 N. C. 74. Where the point at issue was whether a check which the defendant had received from the plaintiff was to be regarded as a payment or as merely received for collection, the admission of an entry made by the defendant's book-keeper to the effect that the check was in payment was erroneous, and for that reason the judgment was reversed; Jeffries v. Castleman, 68 Ala. 432.

Cash charges. — It is well established that charges of money paid on account of, or money lent to, the adverse party, are not, beyond a very small sum, proper subjects of book account. In Maine, New Hampshire, and Massachusetts, the party's books of account are admissible to charge a cash payment of not over forty shillings or $\$6.66\frac{2}{3}$; Kelton v. Hill, 58 Me. 114; Bassett v. Spofford, 11 N. H. 167; Bailey v. Harvey, 60 N. H.

152, and cases cited; Union Bank v. Knapp, 3 Pick. 96; Burns v. Fay, 14 Pick. 8; Davis v. Sanford, 9 Allen 216. In North Carolina it is allowed to an amount not exceeding sixty dollars; Code of Civil Procedure, § 591. But in most of the other States the rule is strictly construed, and no cash charge is admissible; Case v. Potter, 8 Johns. 211; Vosburgh v. Thayer, 12 Johns. 461; Peck v. Von Keller, 76 N. Y. 604; Bailey v. McDowell, 1 Harrington 346; Townsend v. Townsend, 5 Harrington 125; Boyer v. Sweet, 3 Scam. (Ill.) 120; Sanford v. Miller, 19 Ill. App. 536; Craven v. Shaird, 2 Halst. 345; Wilson v. Wilson, 1 Halst. 95; Inslee v. Prall, 3 Zabr. 457; Cummins v. Hull, 35 Iowa 253, and cases cited; Milligan v. Propeller Bruce, Newb. 539.

The reason of the rule is that, as receipts or notes are generally taken for money lent, there is better evidence of the transaction than the mere entry of a party in his own books in his own favor. "To permit a man to make his neighbor liable for money paid or lent, by the mere act of writing in his private book of account that he paid or lent it, is in the last degree unsafe, hazardous, and dangerous. It is the easiest thing possible to make such a charge — the hardest thing possible to disprove it. Goods are generally bought and sold in a store, in a shop, often by clerks, frequently in the presence of a third party; they are taken mostly to a man's family, and used there. Services are very generally rendered in public, or there are circumstances which afford some possibility of rebutting fraudulent charges respecting them. But not so with money transactions - they occur at a man's home, in the streets and highways, not in the presence of third parties, perhaps more frequently in private than in public. It can always be safely alleged that they so occurred. You may trace goods to their use sometimes, but not money with any certainty. Services generally produce something tangible or visible with which the service was connected, but no man can prove that at a particular time he did not receive money, unless he prove an alibi;" Inslee v. Prall, supra.

In Vermont such entries are admissible. In Warden v. Johnson, 11 Vt. 455, the court say: "That an action on book may be maintained for money either paid, advanced, or lent, in the common and ordinary course of business, has been so long considered as settled that it will be useless to inquire at this day

why it was so. We cannot see any good reason that money should be a better or more proper subject of charge on book when there are other charges with it than when it is a single charge." Chellis v. Woods, Id. 466; Insurance Co. v. Cummings, Id. 503, in which Redfield, J., said: "The fanciful notion which some have entertained that money alone could not be recovered in this form of action" (book debt) "has never been considered as law in this State." But mere memoranda of payments made in a pass-book and not in the regular order of business are incompetent; Lapham v Kelly, 35 Vt. 195; Jewett v. Winship, 42 Vt. 204; Parris v. Bellow's Estate, 52 Vt. 351.

If the evidence shows that the plaintiff is engaged in the business of loaning money, and that money charges are made in the ordinary course of his business, the book is competent evidence of the transactions between the parties; Orcutt v. Hanson, 70 Iowa 604. In this case the plaintiff was loaning and advancing money for the defendant's testator without notes or other evidence of indebtedness except his own books of account, and it further appeared in evidence that the defendant's testator knew that the plaintiff was loaning him money and keeping an account of the transactions between them.

Books of decedents. - Upon the question whether or not the books of account of a deceased person are admissible in an action by his executor or administrator to charge the defendant, there is some conflict of authority. In New York it is held that the order book or account book of a deceased person in which entries have been made not in the presence of the defendant is incompetent, and an item, "Herbert Wedderspoon, coach harness, gold and black trimmed, inch and quarter trace, breeching, \$75," was rejected; Mason v. Wedderspoon, 43 Hun 20, and cases cited. In accordance with this view are Treadway v. Treadway, 5 Ill. App. 478; Bland v. Warren, 65 N. C. 372; Callaway v. McMillan, 11 Heisk. 557. In some other States, the preliminary foundation for their introduction having been laid as in other cases, they are, supported by the oath of the executor or administrator, competent to be submitted to the jury; Dwight v. Brown, 9 Conn. 83; Dodge v. Morse, 3 N. H. 232; Pratt v. White, 132 Mass. 477; Howard v. Patrick, 38 Mich. 795; Buckley v. Buckley, 12 Nev. 423. But memoranda of disputed items covering a period of ten years, made

on a loose strip of paper found by an administrator in his intestate's desk used by him in his dwelling-house, without any proof that they were original entries except the appearance of the paper, or that they were made at or about the time when the right to charge first accrued, or that it was the intestate's custom to make charges in like manner, although the administrator testified that they were in his handwriting, are not admissible as independent evidence to prove that the defendant was indebted to the intestate. Barber v. Bennett, 58 Vt. 476; Costelo v. Crowell, 139 Mass. 588.

PETER v. COMPTON.

TRINITY. -5 W. & M., KING'S BENCH.

[REPORTED SKINNER, 353.]

"An agreement that is not to be performed within the space of one year from the making thereof" means, in the Statute of Frauds, an agreement which appears from its terms to be incapable of performance within the year.

The question upon a trial before *Holt*, Chief Justice, at *Nisi Prius*, in an action upon the case, upon an agreement, in which the defendant promised, for one guinea, to give the plaintiff so many at the day of his marriage, was if such agreement ought to be in writing (a), for the marriage did not happen within a year: the Chief Justice advised with all the judges, and by the great opinion [for there was diversity of opinion, and his own was e contra (b)] where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note is necessary: otherwise not.

This case, as well as Birkmyr v. Darnell, turns on the fourth section of the Statute of Frauds. That section directs, among other things, that no action shall be brought to charge any person, upon any agreement that is not to be

case, that the reason of his opinion was "because the design of the statute was not to trust the memory of witnesses beyond one year."

⁽a) According to the exigency of the Statute of Frauds, 29 C. 2, c. 3, s. 4. Salk. 280.

⁽b) In Smith v. Westall, Lord Ray.316, Lord Holt says, speaking of this

performed within the space of one year from the making thereof, unless the agreement, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. Peter v. Compton turned upon the meaning of the words printed in italics.

The opinion of the majority of the judges in this case has been often since confirmed. Anon., Salk. 280; Francam v. Foster, Skinner 356; Fenton v. Emblers, 3 Burr. 1281; 1 Bl. 333, ubi, per Denison, J., "The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed; it does not extend to cases where the thing may be performed within the year." Accord. Wells v. Horton, 4 Bing. 40, where it was held, that a contract by A., that his executors should pay 10,000l., need not be in writing: and Souch v. Strawbridge, 2 C. B. 808, where the contract was to maintain a child "so long as the defendant should think proper" [and Smith v. Neale, 2 C. B. N. S. 67, in which all that was to be done by the plaintiff, constituting the consideration for the defendant's promise, was capable of being performed in a year; and Ridley v. Ridley, 34 L. J. Cha. 462].

The words of the statute are, however, express; that no action shall lie upon any agreement that is not to be performed within one year after the making thereof, unless it be reduced into writing and signed. Accordingly, when the defendant's wife hired a carriage for five years at ninety guineas per annum, which contract was, by the custom of the trade, determinable at any time on payment of a year's hire; the court held the case within the statute, and that the contract ought to have been in writing; Birch v. Earl of Liverpool, 9 B. & C. 392. And so must a contract for a year's service, to commence at a day subsequent to the making of the contract, Bracegirdle v. Heald, 1 B. & A. 722; Snelling v. Lord Huntingfield, 1 C. M. & R. 20; see also Boydell v. Drummond, 11 East, 142, stated ante, p. 344 [unless perhaps it be the next day, see the direction and observations of Willes, J., Cawthorn v. Cordrey, 13 C. B. N. S. 406, and compare Britain v. Rossiter, 11 Q. B. D. 123, 48 L. J. Ex. 362]. So, also, must a contract for payment of an annuity, though it may determine within the year by the death of the annuitant: Sweet v. Lee, 4 Sc. N. R. 77, 3 M. & Gr. 452 [Farrington v. Donohoe, 1 Ir. R. C. L. 675]; or a contract for more than one year's service, though subject to the like contingency; Giraud v. Richmond, 2 C. B. 835 [or though determinable within a year by notice; Dobson v. Collis, 1 H. & N. 81; ex parte, Acraman, 31 L. J. Cha. 741. In Murphy v. Sullivan, 11 Ir. Jur. N. S. 111, it was held in the Exchequer Chamber that a contract to support a child for life need not be in writing, secus if it had been for a fixed number of years; cf. Davey v. Shannon, 4 Ex. D. 81, 48 L. J. Ex. 459. So, a contract to pay to plaintiff 300l. a year, for so long as she should maintain and educate children properly, was held, in an action for arrears, not to be within the statute; Knowlman v. Bluett, L. R. 9 Ex. 1; the decision was affirmed in Cam. Seac., but on the ground that the action was in substance one for money paid, L. R. 9 Ex. 307, 43 L. J. Ex. 151. In Eley v. Positive Ass. Co., 1 Ex. D. 20, 45 L. J. Ex. 58, affirmed ibid. 88, but on an independent ground, a contract that E. should be solicitor, and should not be removed except for misconduct, was held to be within the statute].

It was hinted in *Bracegirdle* v. *Heald*, and decided in *Donellan* v. *Read*, 3 B. & Ad. 899, that an agreement is not within the statute, provided that all that is to be done by one of the parties is to be done within a year. There the defendant was tenant to the plaintiff, under a lease of twenty years, and, in consideration that the plaintiff would lay out 50l. in alterations, the defendant promised to pay an additional 5l. a year during the remainder of the term. The

alterations were completed within the year, and an action being brought for the increased rent, it was objected, among other things, that the contract could not possibly be performed within a year, and therefore ought to have been in writing. The court, however, held that it was not within the statute. "We think," said Littledale, J., delivering the judgment of the court, "that, as the contract was entirely executed on one side within the year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer time than a year: and surely the law would not sanction a defence on that ground, where the buyer had had the full benefit of the goods on his part." See Hoby v. Roebuck, 7 Taunt. 157, 2 Marsh. 433 [Souch v. Strawbridge, 2 C. B. 808, per Tindal, C. J.; and Green v. Saddington, 7 E. & B. 503].

It may be observed on this decision, that the contrary seems to have been taken for granted in Peter v. Compton, and others of the older cases: for instance, in Peter v. Compton, there would have been no occasion to argue the question, whether the possibility that the plaintiff's marriage might not happen for a year brought the case within the statute or no, if the payment of the guinea, which took place immediately, had been considered sufficient to exempt the agreement from its operation. It may be further observed that the decision in Donellan v. Read makes the word agreement bear two different meanings in the same section of the Statute of Frauds: the words of the 4th section are -"That no action shall be brought, whereby to charge any executor or administrator, upon any special promise to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Now, it is clear, that the word agreement, when lastly used in the section, means what is to be done on both sides: and it [was] frequently [before the 19 & 20 Vict. c. 97] held upon that very ground, that guaranties [were] void, if they [did] not contain the consideration as well as the promise, Wain v. Warlters, 6 East 10; Jenkins v. Reynolds, 3 B. & B. 14; Saunders v. Wakefield, 4 B. & A. 595; Sykes v. Dixon, 9 A. & E. 693, 1 Wms. Saund. 211, in notis; the notes to Birkmyr v. Darnell, ante [and see Shadwell v. Shadwell, 9 C. B. N. S. 159, 30 L. J. C. P. 145]; but a much more confined sense appears to be bestowed upon the word agreement when it is held that an agreement is capable of being executed within a year, where one part only of it is capable of being so. In the case put by Mr. Justice Littledale, of goods delivered immediately, to be paid for after the expiration of a year, great hardship certainly would be inflicted on the vendor, if he were to be unpaid, because he could not show a written agreement. But it [might] be worthy of consideration [supposing Donellan v. Read could be considered a doubtful authority] whether, even if he were to be prevented from availing himself of the special contract under which he sold the goods, he might not still sue on a quantum meruit. See Teal v. Auty, 2 B. & B. 99, 4 Moore, 542; Earl of Falmouth v. Thomas, 1 C. & M. 109; Knowles v. Mitchell, 13 East 249 [Green v. Saddington, 7 E. & B. 503; and it is now clear that he may. See Knowlman v. Bluett, L. R. 9 Ex. 307; 43 L. J. Ex. 151; Pulbrook v. Lawes, 1 Q. B. D. 284, 45 L. J. Q. B.178; as to an account stated, see Cocking v. Ward, 1 C. B. 858; Laycock v. Pickles, 33 L. J. Q. B. 43]. In Boydell v. Drummond, 11 East, 159, it is expressly settled that part performance will not take an agreement out of the statute, and that upon principles which seem not inapplicable to the question in Donellan v. Read. "I cannot," said Lord Ellenborough, "say that a contract is performed, when a great part of it remains un-performed within the year, in other words, that part performance is performance. The mischief meant to be prevented by the statute was the leaving to memory the terms of a contract for a longer time than a year. The persons might die who were to prove it, or they might lose their faithful recollection of the terms of it." (See Smith v. Westall, L. Ray. 316.)

These observations seem applicable in full force to such a case as Donellan v. Read. The performance of one side of the agreement within the year could not be said to be more than part performance of the agreement; and the danger that witnesses may die, or their memories fail, seems to be pretty much the same in every case where an agreement is to be established, after the year is past, by parolevidence. Indeed, if there be any difference at all in the danger of admitting oral testimony after the year, it seems greater in a case where one side of the agreement only has been performed, than in such a case as Boydell v. Drummond; since, where the agreement has been partially performed on both sides, as in the latter case, a witness giving a false or mistaken account of its terms, would have to render his tale consistent with what had been done by both contractors; whereas, if the part performance had been on one side only, the witness would only have to make his tale consistent with what had been done upon that side. It is true that in Donellan v. Read there was a part performance on both sides: but so there was in Boydell v. Drummond; and the reason assigned for the decision in Donellan v. Read, viz. that the whole of one side of the agreement was performable within the year, would equally apply in a case where there had been, and could be, no part performance on the other side for twenty years. It seems, however, too late to question the correctness of that decision: Cherry v. Heming, 4 Exch. 631. [Miles v. New Zealand, &c., Co., 32 Ch. D. 266, 54 L. J. Ch. 1035.]

In a case falling within the 4th section, the plaintiff had verbally agreed to go into possession of a brickyard, then in the occupation of the defendant as tenant to a third party, and to take certain plant at a valuation, the defendant undertaking to pay the rent. The plaintiff had performed his part of the agreement, and on defendant's failure to pay the rent had suffered a distress. It was held (before the Judicature Act) that the plaintiff could not sue on the agreement for payment of the rent, and Green v. Saddington, 7 E. & B. 503, was distinguished as a case in which there were separable contracts, Hodgson v. Johnson, 28 L. J. Q. B. 88. The decision has been recently questioned in Pulbrook v. Lawes, 1 Q. B. D. 284, 45 L. J. Q. B. 178, where it is pointed out that a claim to compensation clearly existed independently of the agreement. And, as the doctrines of equity now prevail in all branches of the court, it would seem that under like circumstances an action would now be maintainable on the agreement itself, for it seems that such acts of part performance distinctly referable to the agreement would have sufficed in equity to take it out of the statute, had the relief sought been such as a court of equity had jurisdiction to bestow. See even before the Judicature Act, per Kelly, C. B., Ecclesiastical Commissioners v. Merral, L. R. 4 Ex. 162; Mayor of Kidderminster v. Hardwick, L. R. 9 Ex. 13.

For the doctrine of part performance see notes to Lister v. Forcroft; White and Tudor's L. C. in Equity, vol. i.; and for a recent instance of its application, see Ungley v. Ungley, 5 Ch. D. S87, 46 L. J. Ch. S54; and compare Maddison v.

Alderson, 8 App. Cas. 467, 52 L. J. Q. B. 757; Humphreys v. Green, C. A. 10-Q. B. D. 148, 52 L. J. Q. B. 140.

The doctrine of equity was, however, only applicable to cases where, from the nature of the contract itself, the court had jurisdiction, and did not apply to cases in which the only ground for the intervention of equity was the absence of a remedy at law by reason of the want of writing. For this would have had the effect of getting rid of the statute in all cases of part performance of parol contracts. See Kirk v. Bromley, 2 Phil. 640; Britain v. Rossiter, 11 Q. B. D. 123, 48 L. J. Ex. 362, in which latter case it is laid down that the doctrine is limited to suits concerning land.

In general. — That clause of the fourth section of the statute of frauds which we shall examine in this note has reference, it will be observed, not to the subject-matter of the contract, but to the time of its performance. It may happen, therefore, that a verbal contract of guaranty, for instance, or a contract for the sale of goods, wares, or merchandise above a certain value may be doubly invalid, if the time of its performance be, by the terms of the contract, postponed to a later period than one year from the making thereof. As was said by Bayley, J., "The mischief meant to be prevented by the statute was the leaving to memory the terms of a contract for a longer time than a year. The persons might die who were to prove it. or they might lose their faithful recollection of the terms of it:" Boydell v. Drummond, 11 East 159.

Principal case. — In the principal case, the statute was interpreted to mean that those oral contracts alone are invalid "where it appears by the whole tenor of the agreement that it is to be performed after the year." In other words, in order that the statute shall apply, it must appear affirmatively from the agreement itself that the contract was not to be performed within a year; Roberts v. Rockbottom Co., 7 Met. 46; Randall v. Turner, 17 Ohio St. 262; Walker v. Johnson, 96 U.S. 424; Lawrence v. Cooke, 56 Me. 187; Hinkle v. Fisher, 104 Ind. 84 (1885); Parker v. Siple, 76 Ind. 345 (1881). The effect of this construction of the statute, from which it will be observed that Holt, C. J., dissented, has been in a great measure to abrogate the enactment, and the tendency of the latest English cases has been to limit the application of this principle as much as possible, when not precluded by earlier judicial decisions. See Davey v. Shannon, infra. The general

principle, however, is now too well established to be shaken, both in England and in this country, and its application involves the most considerable difficulties on this branch of the statute.

Where no fixed time is agreed upon by the parties. - The questions which present the greatest embarrassment have arisen where no fixed time is agreed upon by the parties to the contract, but where its performance depends upon the happening of some contingency, express or implied. The generally accepted rule now seems to be that if, by a reasonable construction of the contract, the happening of the contingency within one year is contemplated by the parties, the statute does not apply. It is, of course, immaterial that as a matter of fact the performance of the contract has consumed a longer period than a year. Nor is it sufficient, to bring an oral contract within the statute, that the parties expected that it would not be performed till the expiration of a year. If by the contract itself it appears that performance might reasonably, within the contemplation of the parties, take place within the period of a vear, the statute is held not to operate. We will first consider those cases in which under the principle above stated the statute is held not to apply.

Where the performance of the contract is to take place at some future time which is uncertain. - Thus a promise to pay money on the day of the promisor's marriage, principal case; or to leave money by will, the implied contingency being the death of the promisor, which may happen within a year; Fenton v. Emblers, 3 Burr. 1278; Ridley v. Ridley, 34 Beav. 478; Izard v. Middleton, 1 Des. (S. C.) 116; Bell v. Hewitt, 24 Ind. 280; Jilson v. Gilbert, 26 Wisc. 637; Wells v. Horton, 4 Bing. 40. But see Quackenbush v. Ehle, 5 Barb. (N. Y.) 469, which can hardly be considered to be law. So to pay money on the death of a third person; Thompson v. Gordon, 3 Strobh. (S. C.) Law 196; King v. Hanna, 9 B. Mon. (Ky.) 369; Frost v. Tarr, 53 Ind. 390; Riddle v. Backus, 38 Iowa 81; Sword v. Keith, 31 Mich. 247. So to pay when a sum of money is received from a third person, which event may happen within a year; Artcher v. Zeh, 5 Hill (N. Y.) 200; or to marry at the end of a voyage, when that contingency may happen within a year; Clark v. Pendleton, 20 Conn. 495. So promises to indemnify when the obligation assumed by the promisee may

be forfeited within a year; Blake v. Cole, 22 Pick. 97. See also Kimmins v. Oldham, 27 W. Va. 258 (1885), in which a promise to indemnify the plaintiff against all liability on a note payable at the end of a year was held within the statute. So to pay expenses of suit at its termination; Gonzales v. Chartier, 63 Tex: 36 (1885); Derrick v. Brown, 66 Ala. 162 (1880). As to contracts of insurance, where the contingency might occur within a year, see Walker v. Metropolitan Insurance Co., 56 Me. 371. See also in general McGinnis v. Cook, 57 Vt. 36 (1885); Heflin v. Milton, 69 Ala. 354 (1881). The cases just considered are where the contract is to be performed at some uncertain time in the future, upon the happening of a contingent event which may take place within a year.

Where the performance of the contract is to begin at once, and the time of its completion is uncertain. - We will now consider that class of cases where some act is to begin at once, and is to continue until the happening of some contingency, express or implied. Thus in the following cases the statute has been held not to apply, on the ground that the contract might be performed within a year if a certain contingency should occur: to pay money during the promisee's life, since the plaintiff's death might take place within a year; Hutchinson v. Hutchinson, 46 Me. 154. See also Tolley v. Greene, 2 Sandf. (N. Y.) Ch. 91; Rhodes v. Rhodes, 3 Sandf. Ch. 279; Blanchard v. Weeks, 34 Vt. 589. But see Berry v. Doremus, 30 N. J. L. 399, where this well recognized principle seems to be ignored. So to pay during the life of a third person; Gilbert v. Sykes, 16 East 150; Burney v. Ball, 24 Ga. 505; Wiggins v. Keizer, 6 Ind. 252. So a verbal promise to work for another during his life; Updike v. Ten Bræck, 32 N. J. L. 105; Kent v. Kent, 62 N. Y. 560; Dresser v. Dresser, 35 Barb. 573. So a promise to board the promisee during his life; Howard v. Burgen, 4 Dana (Ky.) 137; Alderman v. Chester, 34 Ga. 152; Bull v. McCrea, 8 B. Mon. (Ky.) 422; Heath v. Heath, 31 Wisc. 223; Harper v. Harper, 57 Ind. 547; Murphy v. O'Sullivan, 18 Ir. Jur. 111. So a promise to educate a child; Ellicott v. Turner, 4 Md. 476. See also Wilhelm v. Hardman, 13 Md. 140; Abbott v. Inskip, 29 Ohio St. 59. So also a promise to pay during coverture; Houghton v. Houghton, 14 Ind. 505. In all the above cases the contingency the happening of which might make the contract performable within a year was death. But, whatever the contingency, the statute does not

apply, if the contract may reasonably be performed within a year through the happening of that contingency. See Houghton v. Houghton, 14 Ind. 505; Railroad Co. v. Staub, 7 Lea (Tenn.) 397 (1881). See also Talmadge v. R. & S. R. R. Co., 13 Barb. 493. Thus, where there is no stipulation as to any fixed time for the performance of a contract, the statute does not apply, when it may be rescinded at any time by either party; Esty v. Aldrich, 46 N. H. 127; Sherman v. Champlain Trans. Co., 31 Vt. 162; Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305; Knowlman v. Bluett, L. R. 9 Exch. 1, 307; Greene v. Harris, 9 R. I. 401; Blakeney v. Goode, 30 Ohio St. 350. And, in general, any verbal agreement where no time of performance is fixed is valid, unless the intention of the contracting parties be clear that the performance is to be after the expiration of a year; McPherson v. Cox, 96 U. S. 404; Adams v. Adams, 26 Ala. 272; Soggins v. Heard, 31 Miss. 426; Suggett v. Cason, 26 Mo. 221; Rogers v. Brightman, 10 Wisc. 55; Marley v. Noblett, 42 Ind. 85; Van Woert v. Albany & Susquehanna R. R. Co., 67 N. Y. 538; Hedges v. Strong, 3 Ore. 18; Blair Town Lot Co. v. Walker, 39 Iowa 406; Blackburn v. Mann, 85 Ill. 222; Duff v. Snider, 54 Miss. 245; Thomas v. Hammond, 47 Tex. 42; Dean v. Tallman, 105 Mass. 443; Dougherty v. Rosenberg, 62 Cal. 32 (1883). On this principle it is held that a general promise to marry is without the operation of the statute; Wheeler v. Cowan, 25 Me. 283; Nicholls v. Weaver, 7 Kans. 373; Blackburn v. Mann, 85 Ill. 222. So an oral contract of partnership for an indefinite period; Jordan v. Miller, 75 Va. 442 (1881). See also Somerby v. Bunting, 118 Mass. 279. But see infra where there is a fixed term agreed upon by the parties.

Agreements to refrain from certain acts for an indefinite period.—If promises to continue to do certain acts for an indefinite period are without the statute, when contingent upon some event which may happen within the year, à fortiori promises to refrain from such acts for an indefinite period are without the operation of the statute, under the same circumstances. Thus an agreement not to engage in the livery or staging business in a certain town indefinitely; Lyon v. King, 11 Met. 411. See also Worthy v. Jones, 11 Gray 168. So a promise never to practise medicine in a certain town; Blanding v. Sargent, 33 N. H. 239; Blanchard v. Weeks, 34 Vt.

589. So an agreement not thereafter to sell or engage in selling musical instruments; Hill v. Jamieson, 16 Ind. 125; Richardson v. Pierce, 7 R. I. 330; Worthy v. Jones, 11 Grav 168. In a recent English case, however, Davey v. Shannon, L. R. 4 Ex. D. 81, a verbal promise not to engage thereafter in a certain trade was held to be within the statute. In the language of Hawkins, J., "primâ facie it was not to be performed within a year." So also in Eley v. Positive Ass. Co., 1 Ex. D. 20, 88, an agreement to employ a solicitor for life was held to be within the statute. These cases are utterly at variance with all the American cases on the subject, and apparently it is impossible to reconcile them with the earlier English cases, in which the contingency of death was fully recognized as sufficient to take an oral promise without the statute, and on the authority of which the American law was established; Souch v. Strawbridge, 2 C. B. 808.

Nature of contingency. - The English cases just cited naturally lead us to the most difficult branch of our subject, to wit how far the courts will investigate the nature of the contingency upon which the time of the performance of the contract depends. Is it enough that by some bare possibility, contrary to the ordinary course of events, and hence not contemplated by the contracting parties, the contract may be performed within the year? The great weight of authority seems to be that in such cases the statute will apply, though there are some cases which boldly carry out the doctrine of Peter v. Compton to its legitimate results, and which hold that if the contract could possibly be performed within a year the statute does not apply. See infra. The subject is attended with all the greater difficulty as each case is bound to rest upon its own peculiar facts, and since there are many adjudicated decisions which approach the division line between the two doctrines. In a very important case recently decided in Maine, the supreme court, regardless of precedent, undertook to put at rest this most difficult question forever by leaving the whole matter to the jury, under proper instruction from the court; Farwell v. Tillson, 76 Me. 227 (1884). See infra. The first and most celebrated English case on this subject is Boydell v. Drummond, 11 East 142. The facts were that the defendant had verbally subscribed to a series of large prints illustrative of scenes from Shakespeare, and, according to the prospectus, "one number at

least should be published annually, and the proprietors were confident they should be enabled to produce two numbers within the course of every year." The defendant having received two numbers and having refused to take any more, this action was brought against him to recover the price of the remaining numbers, the plaintiffs having duly laid them aside for him as they came out. It was unanimously agreed by the judges that this contract was invalid, as one not to be performed within a year. In the language of Lord Ellenborough, "the whole scope of the undertaking shows that it was not to be performed within a year." Grose, J., said that, considering the nature of the work and of the prospectus, it was "impossible to say that the parties contemplated that work was to be performed within a year."

In this case, accordingly, the court undertook to investigate the nature of the contingency as bearing upon the question whether the possibility of performance within the year was contemplated by the parties to the contract. According to this decision, the test is not whether by any possibility the contract might be performed within a year, nor yet whether the parties expected it to be performed within a year, but whether the possibility of its being performed within that period of time was contemplated by the contracting parties. The principle of Boydell v. Drummond has been generally adopted in this country. Thus in Lockwood v. Barnes, 3 Hill (N. Y.) 128, it was held that no action would lie where it was orally agreed by the parties that one of them should have a colt at a price to be paid on delivery, the colt to be got by his stallion out of the other's mare, and the latter to keep the mare in his possession, and to keep the colt until the ordinary weaning time. The ground of the decision was that according to the ordinary course of nature the contract could not be performed within a year, since the ordinary period of gestation was eleven months, and the ordinary period of weaning from four to six months. The mere fact that contrary to the ordinary law of nature the contract might possibly have been performed within a year was held insufficient to take the agreement out of the statute; Groves v. Cook, 88 Ind. 169 (1883), accord. So in Herrin v. Butters, 20 Me. 119, the statute was held to apply, on the authority of Boydell v. Drummond, where the contract was to clear eleven acres of land in three years from date, one acre to be seeded down the present spring, one acre the next spring, and one acre the spring following, the compensation to be all the proceeds of the land for these years, except the two acres first seeded down. The court say: "We are not to inquire what, by possibility, the defendant might have done by way of fulfilling his contract. We must look to the contract itself, and see what he was bound to do, and what, according to the terms of the contract, it was the understanding that he should do. Was it the understanding and intention of the parties that the contract might be performed within one year? If not, the case is clearly with the defendant." See also Saunders v. Kastenbine, 6 B. Mon. (Ky.) 17; Hinckley v. Southgate, 11 Vt. 428; Somerby v. Buntin, 118 Mass. 279; Clark v. Pendleton, 20 Conn. 495; Lapham v. Whipple, 8 Met. 59; Frary v. Sterling, 99 Mass. 461; Curtis v. Sage, 35 Ill. 22; Tuttle v. Swett, 31 Me. 555; Holloway v. Hampton, 4 B. Mon. 415; Bartlett v. Wheeler, 44 Barb. 162. In Gault v. Brown, 48 N. H. 183, on the other hand, it was held that the statute did not apply to an oral contract for the sale of a lot of standing timber, to be felled and delivered so far as possible that winter, the rest to be felled and delivered the following winter. See also Chaffe v. Benoit, 60 Miss. 34 (1882). So in Sutphen v. Sutphen, 30 Kans. 510 (1883), an oral promise to pay to the plaintiff \$650 as soon as it could be earned off a tract of eighty acres, after supporting the defendant's family, was held not to be within the statute. From the report of this case it would seem that the court undertook to decide the question of fact whether from a farm of this size in Kansas this contract could reasonably be performed within a year. It would seem, however, though hardly supported by precedent, that the decision of the Maine court already referred to was right in holding that questions of this sort are for the jury, under proper instructions from the court; Farwell v. Tillson, 76 Me. 227 (1884). In this case the defendant had orally agreed to ship stone on the plaintiff's vessel from his quarries in Maine to Baltimore, in accordance with a contract made by the defendant with the United States government, by which he had agreed to furnish it with building stone for the erection of a public building. The contract between the defendant and the government, which was indefinite in time, was held to be a part of the contract between the plaintiff and defendant.

court held that it was a question for the jury, under all the circumstances of the case, considering the capacity of the defendant's quarries and the advance towards completion of the government building, whether the contract was one to be performed within a year.

In a recent Maryland case, the doctrine of Boydell v. Drummond seems distinctly to be repudiated; Cole v. Singerly, 60 Md. 348 (1883). In this case it seems to be held that the statute does not apply, whatever the intention of the parties, if, by any possibility, the contract might have been performed within a year. The defendant having orally promised the plaintiff that if he should purchase a certain mill he would employ him as his superintendent for the period of one year, the statute was held not to apply, since the defendant might, by a bare possibility, have instantly purchased the mill of its present owner. That this contingency was contemplated by the parties to the contract is certainly most unlikely. See also Ellicott v. Peterson, 4 Md. 475; Blair Town Lot Co. v. Walker, 39 Iowa 406.

Where a fixed time is agreed upon by the parties for the performance of the contract. - In all the cases heretofore considered the time of performance of the contract was left indefinite by the parties, and if, by the happening of some contingency, express or implied, this performance might, within the contemplation of the parties, take place within a year, it has been seen that the statute is held not to apply. When, however, the time of performance or completion of a contract is fixed by the parties themselves at a period more than one year from the making thereof, the statute will generally render such verbal agreements invalid, and few real difficulties present themselves on this branch of the subject. To this class of cases the courts have generally declined to apply the contingency rule, which is held to take out of the statute most verbal contracts which are indefinite as to time. The rationale of this distinction seems to be that where there is a special stipulation by the parties for a longer period than one year the court cannot say that a performance of the contract within one year was contemplated by the parties, although the happening of some contingency might make the agreement determinable within the year. Again it is said by the courts that when a period of more than a year is expressly agreed upon by the parties the happening of a contingency

within the year does not, as in the case of a contract indefinite as to time, make the contract performable within that period, but defeasible or impossible of performance. Thus the contingency of death is held not to take without the statute contracts personal in their nature, which do not survive to the personal representative, if a definite period of time beyond a year is agreed upon by the parties. In the event of the death of the contracting party, the contract would not be performed, Otherwise, all personal contracts would be withbut defeated. out the operation of the statute. Thus, contracts for personal services for more than a year are within the statute, though where the contract is for the life of either party the statute is held not to apply: King v. Welcome, 5 Gray 41; Bernier v. Cabot Manf. Co., 71 Me. 506; Comes v. Lamson, 16 Conn. 246; Freeman v. Foss, 145 Mass. 361 (1887). See also Shute v. Dorr, 5 Wend. (N. Y.) 204; Roberts v. Tucker, 3 Exch. 632. So a contract of apprenticeship for five years, although the contract might be terminated within the year, by the minor's death; Hill v. Hooper, 1 Gray 131. This last case would seem substantially to have overruled Peters v. Westborough, 19 Pick. 364, where a contract for the support of a minor for a definite number of years was held to be without the statute. See, however, the language of Gray, J., in Doyle v. Dixon, 97 Mass. 208, in which an attempt is made to distinguish these cases in accordance with the principle now under consideration. In Murphy v. O'Sullivan, 18 Irish Jurist 111, it was expressly held that a contract for support for a term of years was within the statute. Packet Co. v. Sickles, 5 Wall. (U. S.) 580, furnishes another illustration of this principle. Here there was a verbal contract for the use of a certain patent cut-off on a certain steamboat, for a term of years. The contingency of the destruction of the steamboat was held by the United States Supreme Court not to take the agreement without the statute, since, in such an event, the contract would not be performed, but determined. So a contract for hiring for more than a year is within the statute, although it is stipulated that either party may terminate the contract by notice; Dobson v. Collis, 1 Hurlst. & N. 81. This principle was expressly adopted in a recent Arkansas case; Myer v. Roberts, 46 Ark. 80 (1885). Here there was an oral contract of hiring for the remainder of a year, and for the ensuing year, if neither party should object on the 1st of January, and the statute was held to apply. The decision in Smith v. Conlin, 19 Hun (N. Y.) 234 (1879), where the facts were the same as in the last mentioned case, seems clearly to have been erroneous. The oral contract was held to be valid, on the authority of Trustees v. Brooklyn Fire Insurance Co., 19 N. Y. 305. This case, however, decided a very different point, to wit that an oral agreement for the renewal of a lifeinsurance policy from year to year was not within the statute. Brigham v. Carlisle, 78 Ala. 243 (1885), is to the same effect. See also, on the general principle that an oral agreement for more than a year is none the less within the statute because it may be determined or defeated within the year, Birch v. Liverpool, 9 Barn. & C. 392; Acraman ex parte, L. T. N. S. 84; Van Schovek v. Backus, 9 Hun. (N. Y.) 68; Deaton v. Tennessee Coal and Railroad Co., 12 Heisk. (Tenn.) 650; Farwell v. Tillson, 76 Me. 227 (1884).

This doctrine was also invoked by the court in support of the decision in Doyle v. Dixon, 97 Mass. 208. In this case it was held that an oral agreement, by which the defendant agreed not to engage in a certain business for a certain term of years, was binding upon him, and that the statute had no application, on the ground that if the defendant should die within the year the contract would then be completely performed, since a subsequent breach would be impossible. The court thus distinguish between a negative agreement, or an agreement to refrain from certain acts for a term of years, and an agreement to perform certain acts or services for such a period of time. This rather refined distinction has failed to receive the approval of the other courts of this country which have had occasion to pass upon the question, and it is indeed difficult to see how the contingency of death can make such a contract performable within a year, merely because the possibility of a breach is terminated. In cases like Hill v. Hooper, supra, the statute is held to apply, although the possibility of performance may be terminated within the year. Why, then, on principle, should the statute be held not to apply, although the possibility of committing a breach may be terminated within a year? At variance with the rule adopted in Doyle v. Dixon are Perkins v. Clay, 54 N. H. 518; Gottschalk v. Witter, 25 Ohio St. 76; Self v. Cordell, 45 Mo. 345. See also Davey v. Shannon, 4 Ex. D. 81.

Where a period of more than a year is allowed by the terms of the agreement. - It has been seen that where, by the terms of the agreement itself, a longer period than one year is required for the performance of a contract, the statute applies. There is, however, an important line of cases which hold that where a period of more than a year is allowed for the performance of a contract the statute will not operate so as to render invalid such verbal agreements. It is well settled law that the mere limitation of the performance of a contract to a period of time greater than a year is not sufficient to bring it within the statute. Such agreements are on the same footing as contracts indefinite as to time, which may be performed within a year, with the unimportant difference that they must be performed within a certain period of time longer than a year. Thus in a recent Ohio case an oral agreement for the construction of a road, the road to be completed within one year and twenty days from the time of the making of the contract, was held to be without the statute; Jones v. Pouch, 41 Ohio St. 146 (1884). See also to the same effect Walker v. Johnson, 96 U.S. 424; Southwell v. Beezley, 5 Ore. 143; Hodges v. Richmond Manufacturing Co., 9 R. I. 482; Paris v. Strong, 51 Ind. 339; Plimpton v. Curtiss, 15 Wend. (N. Y.) 336; Kent v. Kent, 18 Pick. 569; Artcher v. Zeh, 5 Hill (N. Y.) 200; Lapham v. Whipple, 8 Met. 59; Linscott v. McIntire, 15 Me. 201; Smith v. Westall, 1 Ld. Raym. 316; Saunders v. Kastenbine, 6 B. Mon. (Ky.) 17.

Contracts for a year. — All contracts which require more than a year for their performance, however little the year may be exceeded, are within the statute. In the words of Lord Ellenborough, "If we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop, for, in point of reason, an excess of twenty years will equally not be within the act;" Bracegirdle v. Heald, 1 Barn. & Ald. 722. A contract of hiring for a year to begin in præsenti is, of course, without the operation of the statute; McAleer v. Corning, 50 N. Y. Super. Ct. 63 (1884); see also Sanborn v. Ins. Co., 16 Gray 448; and to a similar contract to begin in future, by parity of reasoning, the statute applies. In Dickson v. Frisbee, 52 Ala. 165, it was decided, on the supposed authority of Cawthorne v. Cordrey, 13 C. B. N. S. 406, that a contract of hiring for a year, to begin on the following day, was without

the statute. In the English case, however, there was evidence that the parties intended that the performance of the contract should begin immediately. The doctrine of the Alabama case was expressly repudiated in Levison v. Stix, 10 Daly (N. Y.) 229 (1881), where it was held that an oral contract, made on the 31st of December, for services to be rendered for a period of one year, ending with the 31st of December of the following year, was invalid as within the statute of frauds. In a recent Rhode Island case, Sutcliffe v. The Atlantic Mills, 13 R. I. 480 (1882), where the contract of service was for a year, to begin as soon as the servant was able, and, as a matter of fact, the services did not commence for several days, it was held that the statute applied. The court held that the actual time of the commencement of the services controlled the meaning of the words "as soon as he was able," and distinguished the case from Russell v. Slade, 12 Conn. 455, where there was evidence that the intention of the parties was that the services should commence at once, though they did not actually commence for several days. But see Cole v. Singerly, 60 Md. 348 (1883). See in general Snelling v. Lord Huntingfield, 1 Cromp. M. & R. 20; Nones v. Homer, 2 Hilton (N. Y.) 116; Kelly v. Terrell, 26 Ga. 551; Shipley v. Patton, 21 Ind. 169; Kleeman v. Collins, 9 Bush. (Ky.) 460; Hearne v. Chadbourne, 65 Me. 302; Sharp v. Rhiel, 55 Mo. 97; Wilson v. Martin, 1 Denio 602; Amburger v. Marvin, 4 E. D. Smith (N. Y.) 393; Blanck v. Littell, 9 Daly (N. Y.) 268 (1880); Kimmins v. Oldham, 27 W.Va. 258 (1885); Britain v. Rossiter, 11 Q. B. D. 123.

"Performance" of the contract.—By performance within a year the statute has always been interpreted to mean a complete and full performance. Unless the contract may, within the contemplation of the parties as interpreted by the court, be completely executed within the year, the statute is held to apply; Boydell v. Drummond, 11 East 142. Thus an oral agreement to pay a sum of money by annual instalments is, of course, within the statute; Giraud v. Richmond, 2 C. B. 835; Drummond v. Burrell, 13 Wend. (N. Y.) 307; Parks v. Francis, 50 Vt. 626; McElroy v. Ludlum, 32 N. J. Eq. 828 (1880). See also Tatterson v. Suffolk Manf. Co., 106 Mass. 56. So an oral contract to pay at intervals of less than a year, the whole period of payment to extend beyond the year; Hill v. Hooper, 1 Gray 131; Tiernan v. Granger, 65 Ill. 351. If, however, at the option of

the party, the whole sum might be paid within the year, the statute does not apply; Moore v. Fox, 10 Johns. (N. Y.) 243; Drummond v. Burrell, 13 Wend. 307. See, however, the decision in Saunders v. Kastenbine, 6 B. Mon. 17, which seems clearly upon this principle to be erroneous. In this case, a negro purchasing the freedom of his wife agreed to pay for her \$400 in instalments of at least \$4 a month, and it was stipulated that, while he need not pay more than \$8 a month, he could, if he pleased, pay any amount not less than \$4. agreement was held to be within the statute, notwithstanding the contract might be entirely executed within the year at the option of the purchaser. When the different items contained in a contract are divisible, the statute, of course, only affects those which are to be performed after the expiration of the year. Thus, in Mayor v. Pyne, 3 Bing. 285, it was held that upon a verbal contract for the purchase of twenty-four numbers of a periodical work, to be delivered monthly at a guinea a number, an action would lie for those numbers actually delivered within the year, and that the price agreed upon might be shown in evidence. The case was distinguished from Boydell v. Drummond on the ground that the contract was divisible.

The statute of frauds as a defence. — The important question has arisen before several of our courts as to whether a verbal contract within the clause of the statute now under consideration could be set up as a defence to an action on a quantum meruit, when the plaintiff has himself committed a breach of that contract. There is much conflict among the cases, both those arising under this section of the statute as well as under the 17th section, on the point whether the statute renders oral contracts which are embraced by its provisions absolutely null and void for all purposes; whether the writing required by the statute is a mere matter of evidence, or whether it is a vital and essential part of the contract itself so as to be properly governed and controlled by the lex loci contractus. Carrington v. Roots, 2 M. & W. 248; Reade v. Lamb, 6 Exch. 130; Leroux v. Brown, 12 C. B. 801; Denny v. Williams, 5 Allen 1.

The same question, in a somewhat different form, is presented under the "year" clause of the statute. Though no action could be brought on the oral contract not to be performed within a year, has this sufficient vitality to constitute a valid defence? In accordance with the *void* theory of the statute of frauds, it

has been decided in Maine, Massachusetts, and Connecticut that such an oral contract constitutes no defence. The statute is held to be a bar even to its indirect enforcement. Thus in Comes v. Lamson, 16 Conn. 246, where the plaintiff by oral agreement bound himself to serve the defendant for a term longer than one year, for a consideration to be paid at the end of that time, and, having repudiated the contract and quitted his employer at the end of six months, brought his action to recover the value of the services so rendered, the court held that he could recover, and that the defendant could not set up the verbal agreement in defence; Clark v. Terry, 25 Conn. 395; King v. Welcome, 5 Gray 41; Freeman v. Foss, 145 Mass. 361 (1887); Bernier v. Cabot Manf. Co., 71 Me. 506, accord. But see Mack v. Bragg, 30 Vt. 571; Swanzey v. Moore, 22 Ill. 63, contra.

Where there is a complete performance on both sides. — Under the "year" clause of the statute, as under the other provisions of the statute with reference to contractual rights, the law is well settled that where there is a complete performance on both sides the statute does not operate. Thus in Stone v. Dennison, 13 Pick. 4, an action was brought on a quantum meruit for the value of work and labor, and it appeared that by an oral contract, which was for a longer period than one year, the plaintiff was to perform work and labor for the defendant, and the defendant was to board and educate the plaintiff, and that the contract had been fully executed on both sides. The court held that this contract could be shown in evidence to defeat the plaintiff's action, and that the statute of frauds had no application; Mauck v. Melton, 64 Ind. 415, citing cases.

Contract executed on one side.—In England a doctrine has been introduced in the interpretation of the "year" clause of the statute of frauds which goes far towards nullifying that enactment, and which has met with little favor in this country, at least to its full extent. This doctrine was first hinted at in Boydell v. Drummond, and in Bracegirdle v. Heald, 1 Barn. & Ald. 727, and was expressly adopted in the case of Donellan v. Reed, 3 Barn. & Ad. 899. This latter decision, though strongly deprecated by the English text-writers, was followed in Cherry v. Heming, 4 Exch. 631; Smith v. Neale, 2 C. B. N. S 67, and other English cases. This doctrine is that if either side

of the contract is capable of being performed within a year the whole agreement is valid. A fortiori, therefore, the statute has no application to agreements not to be performed within a year, when made upon an executed consideration.

The American, like the English, text-writers have severely criticised this doctrine, and indeed it is hard to reconcile with the decision in Wain v. Warlters, 6 East 10, where the word "agreement" in this section of the statute was held to embrace both the promise and the consideration, whereas, according to the doctrine of Donellan v. Reed, the statute is held not to apply if only one side of the agreement is capable of being performed within the year. In all the English cases, the part of the contract which was not to be performed within a year was a promise to pay money, and an action would undoubtedly have lain on a quantum meruit or quantum valebant to recover the value of the executed consideration. No case has arisen in England where an action has been sustained upon a promise to perform some act beyond the period of a year, in consideration of money actually paid. In fact, Peter v. Compton would seem to indicate that the contrary view was entertained by the court.

In America, the decided tendency is not only to confine the right of action to promises to pay money, but to cases where the consideration has been executed by the plaintiff, and has enured to the benefit of the defendant. And many of our courts hold that even then no action can be brought upon the contract itself, but that a quantum meruit or quantum valebant will lie to recover the value of the consideration. It is intimated, however, by Bigelow, C. J., in Marcy v. Marcy, 9 Allen 8, that evidence of the oral contract may be introduced upon the question of value. In a recent Mississippi case the question was said to be merely one of pleading, if confined to promises to pay money, when the consideration had been received by the defendant; Duff v. Snider, 54 Miss. 245. Where the consideration has not enured to the benefit of the defendant, it is generally held that no action will lie; Pierce v. Paine's estate, 28 Vt. 34; Towsley v. Moore, 30 Ohio St. 185; Emery v. Smith, 46 N. H. 151; Kimmins v. Oldham, 27 W. Va. 258 (1885). See also in general Holbrook v. Armstrong, 10 Me. 31; Frary v. Sterling, 99 Mass. 461; Perkins v. Clay, 54 N. H. 518; McElroy v. Ludlum, 32 N. J. Eq. 828 (1880); Curtis v. Sage, 35 Ill. 22; Montague v. Garnett, 3 Bush (Ky.) 297; Self v. Cordell, 45 Mo. 345; Zabell v. Schroeder, 35 Tex. 308; Reinheimer v. Carter, 31 Ohio St. 579; Broadwell v. Getman, 2 Denio 87; but see Talmadge v. Rensselaer & Saratoga R. R. Co., 13 Barb. 493; Bartlett v. Wheeler, 44 Barb. 162; Dodge v. Crandall, 30 N. Y. 294; Weir v. Hill, 2 Lans. 278; Kellogg v. Clark, 23 Hun 393. In a well known Vermont case, Sheehy v. Adarene, 41 Vt. 541, where both sides of the contract were executory, it was held that an action would lie against the party whose promise was capable of being performed within the year, but not against the party the performance of whose contract was to be extra annum. This distinction seems to have no precedent to support it, and it is difficult to see any mutuality in such a contract, where one side only can be enforced at law.

CUMBER v. WANE.

TRINITY. -5 GEO. 1.

[REPORTED 1 STRANGE, 426.]

Giving a note for 51. cannot be pleaded as a satisfaction for 151.

If one party die during a Curia advisari vult, judgment may be entered nunc pro tunc.

Error e C. B. in an indebitatus assumpsit, for 15l. The defendant pleads, that he gave the plaintiff a promissory note for 5l. in satisfaction, and that the plaintiff received it in satisfaction. The plaintiff put in an immaterial replication, to which the defendant demurred. And, after judgment for the plaintiff, it was objected on error, that the plea was ill, it appearing that the note for 5l. could not be a satisfaction for 15l., and that where one contract is to be pleaded in satisfaction of another, it ought to be a contract of a higher nature. Hob. 68; 2 Keb. 804. One bond cannot be pleaded in satisfaction of another. 1 Mod. 225; 2 Keb. 851. Even the actual payment of 5l. would not do, because it is a less sum. 5 Co. 117; 1 Leon. 19. Much less shall a note payable at a future day.

E contra. It was argued, that, the plaintiff's demand consisting only in damages, it was for his benefit to have it reduced to a certainty, and to have the security for it made negotiable (a). A stated account may be pleaded in bar of an action of covenant. 4 Mod. 43; 1 Mod. 261; 1 Roll. Abr. 122. Formerly indeed executory promises were not held a satisfaction, but the contrary has been since adjudged, Raym. 450; Salk. 76. And

⁽a) This argument was considered valid in Sibree v. Tripp, 15 M. & W. 23.

now it is held that an award before performance is a bar of the former action (a).

Et per Pratt, L. C. J. (on consideration). We are all of opinion that the plea is not good, and therefore the judgment must be affirmed. As the plaintiff had a good cause of action, it can only be extinguished by a satisfaction he agrees to accept; and it is not his agreement alone that is sufficient, but it must appear to the court to be a reasonable satisfaction; or at least the contrary must not appear, as it does in this case (b). If 5l. be (as is admitted) no satisfaction for 15l., why is a simple contract to pay 5l. a satisfaction for another simple contract of three times the value? In the case of a bond, another has never been allowed to be pleaded in satisfaction, without a bettering of the plaintiff's case, as by shortening the time of payment. Nay, in all instances the bettering his case is not sufficient, for a bond with sureties is better than a single bond, and yet that will not be a satisfaction. 1 Brownl. 47, 71; 2 Roll. Abr. 470. The judgment therefore must be affirmed (c).

Then it was alleged, that, since the time when the court took to advise, the defendant in error was dead; and therefore they prayed, that they might enter the judgment nunc pro tune, as was done in the case of Baller v. Delander, Trin. 1 Geo. in B. R., which was ordered according (d).

The main point in this case, viz. that a security of equal degree for a smaller sum, if it present no easier or better remedy, cannot be pleaded in an action for the larger one, has frequently been affirmed since the decision of Cumber v. Wane; although the doctrine laid down by Pratt, C. J., in delivering the judg-

⁽a) See Crofts v. Harris, Carth. 187; Parslow v. Barly, Salk. 76; Freeman v. Bernard, Salk. 69; but see Allen v. Milner, 2 Tyrwh. 113. [2 C. & J. 47.]

⁽b) See Pritchard v. Hitchcock, 6 Sc., N. R. 851 [S. C. 6 M. & G. 151], where an issue joined upon the [plea] of payment in satisfaction was sustained by evidence that the payment relied upon was void, as being a fraudulent preference, and that the assignees had recovered the amount. [And see Bell v. Buckley, 11 Exch. 631.]

⁽c) Taylor v. Baker, 5 Mod. 136. But the present case was denied to be law in Hardcastle v. Howard, H. 26 Geo. 3. Vide 2 Term Rep. 28. [But see post.] See also Kearslake v. Morgan, 5 Term Rep. 513.

⁽d) Craven v. Henley, Barnes, 255; Astley v. Reynolds, Str. 917; Tooker v. Duke of Beaufort, 1 Burr. 147; Sir John Trelawney v. Bishop of Winchester, ib. 226, S. P. Vide also 1 Leon. 287; 1 Sid. 462; 1 Vent. 58, 90. But Blackhall v. Heal, Com. Rep. 13, contra.

ment of the court, has not been to its full extent sustained, Sibree v. Tripp, 15 M. & W. 23.

In Fitch v. Sutton, 5 East 230, the action was indebitatus assumpsit for goods sold and delivered. Plea, non assumpsit. At the trial it appeared that the defendant, who owed the plaintiff 50l., had compounded with his creditors, and paid them seven shillings in the pound, and, at the time of such payment to the plaintiff, promised to pay him the residue of his debt when he should be of ability so to do, which he was proved to have been before this action brought. On the other hand, the defendant produced a receipt signed by the plaintiff, for the composition, and which purported to be in full of all demands. And it was urged that the receipt was either a discharge of the promise, or that the promise itself was void, as being a fraud upon his other creditors, or that, at all events, the plaintiff ought not to have declared upon the original cause of action, but specially upon the new promise to pay when of ability. But the court in banco. after a verdict for the defendant, made a rule for a new trial absolute on the express grounds that the acceptance of 17l. 10s. could not be a satisfaction for a debt of 50l. "There must be some consideration," said Lord Ellenborough, "for the relinquishment of the residue, something collateral to show the possibility of benefit to the party relinquishing his further claim, otherwise the agreement is nudum pactum. But the mere promise to pay the rest, when of ability, puts the plaintiff in no better condition than he was before. It was expressly determined in Cumber v. Wane, that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me, in argument in Heathcote v. Crookshanks, to have been denied to be law, and in confirmation of that Mr. Justice Buller afterwards referred to a case, stated to be that of Hardcastle v. Howard, H. 26 G. 3, yet I cannot find any case of that sort, and none has been now referred to: on the contrary, the authority of Cumber v. Wane is directly supported by Pinnell's Case, which never appears to have been questioned." The other judges concurred, and Lawrence, J., referred to Co. Litt. 212 b., and to Adams v. Tapling, 4 Mod. 88, as confirmatory of the same doctrine, in the former of which it was laid down that "where the condition is for payment of 20l. the obligor or feoffor" [i. e., by way of mortgage] "cannot, at the time appointed, pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum cannot be a satisfaction of a greater. But if the obligee or feoffee do at the day receive part, and thereof make an acquittance, under his seal, in full satisfaction of the whole, it is sufficient by reason the deed amounteth to an acquittance of the whole. If the obligor or [feoffor] pay a lesser sum, either before the day, or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." (See the cases on this point collected, Selw. N. P. Debt on Bond; and see Worthington v. Wigley, 3 Bing. N. C. 454.)

Fitch v. Sutton is stated thus at length, because it is perhaps more frequently referred to than any other case upon this subject; the doctrine there laid down, riz. that a similar security for a smaller debt cannot be pleaded in satisfaction of a larger one, has been frequently affirmed, both before and since. See Heathcote v. Crookshanks, 2 T. R. 24; Pinnel's Case, 5 Rep. 117; Lynn v. Bruce, 2 H. Bl. 317; Thomas v. Heathorn, 2 B. & C. 477; 3 D. & R. 647, S. C.; Mitchell v. Crayg, 10 M. & W. 367, where to a demand for 16l. a plea stating an agreement to set off 4l. and the price of a horse in satisfaction was considered bad, because the price of the horse might have been less than the difference. And though it was once ruled at Nisi Prius, that a creditor who had given a receipt in full of all demands would be thereby precluded from insisting afterwards upon any

demand prior to such receipt; Alner v. George, 1 Camp. 392; yet it is clear, both upon general principle, and from the decisions in Fitch v. Sutton, and other cases, that such an instrument, not being an estoppel, cannot prevent the plaintiff from insisting that part of his demand remains unsatisfied. See Graves v. Key, 3 B. & Ad. 313; Skaife v. Jackson, 3 B. & C. 421; Stratton v. Rastall, 2 T. R. 366 [and the explanation of Alner v. George in Bowes v. Foster, 2 H. & N. 779.

The question discussed in this note was recently much considered in Foakes v. Beer, 9 App. Cas. 605; 54 L. J. Q. B. 130, in which case a vigorous attack was made upon the principle for which Cumber v. Wane is generally cited as an authority, with the result that it has been reaffirmed by the highest tribunal, with considerable hesitation, however, on the part of Lord Blackburn. There a judgment creditor had agreed in consideration of payment down of a portion of the judgment debt, and on condition of the residue being paid off by instalments on certain days, to take no proceedings to enforce the judgment. The principal sum due on the judgment had been wholly paid off as provided by the agreement. The creditor sought to recover interest, and the question was whether the agreement barred her claim. Cave, J., was of opinion that it did, and his view was upheld by the Divisional Court. This decision was, however, reversed by the Court of Appeal, on the ground that the agreement was nudum pactum, and afforded no answer to proceedings upon the judgment. The decision of the Court of Appeal was affirmed in the House of Lords.

In moving to dismiss the appeal, Lord Selborne, L. C., says, "The question, therefore, is nakedly raised by this appeal, whether your Lordships are now prepared not only to overrule as contrary to law the doctrine stated by Sir E. Coke to have been laid down by all the judges of the Common Pleas in Pinnel's Case, in 1602, and repeated in his note to Littleton, sect. 344, but to treat a prospective agreement, not under seal, for satisfaction of a debt by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made; the case not being one of composition agreed to inter se by several creditors. I prefer so to state the question instead of treating it as it was put at the bar, as depending on the authority of the case of Cumber v. Wane, decided in 1718. It may well be that distinctions which have been held in later cases to exclude the application of that doctrine existed. and were improperly disregarded in Cumber v. Wane, and yet that the doctrine itself may be rightly recognized in Cumber v. Wane, and not really contradicted by any later authorities. And this appears to me to be the true state of the case. The doctrine itself, as laid down by Sir E. Coke, may have been criticised as questionable in principle by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary, I think it has always, since the sixteenth century, been regarded as law. If so, I cannot think that your Lordships would do right if you were now to reverse as erroneous a judgment of the Court of Appeal proceeding upon a doctrine which has been accepted as part of the law of England for 280 years.

"The doctrine as stated by *Pinnel's Case* is, 'that payment of a lesser sum on the day' (it would of course be the same after the day), 'in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum.'... If the question be (as in the actual state of the law I think it is) whether consideration is or is not given in a case of this kind by the debtor, who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law."]

It must be observed, that later cases seem to have engrafted on the doctrine, that a smaller sum can be no satisfaction for a larger one payable in the same manner, this distinction, that although, where there is a liquidated debt, the rule laid down in *Cumber* v. *Wane* prevails, yet, if there be not a liquidated debt, but an unliquidated demand of pecuniary damages, in that case the acceptance of a smaller sum than the plaintiff may have originally claimed will be a satisfaction of his whole demand, and a good answer to an action in respect of it.

This distinction seems to have originated in the case of Longridge v. Dorville, 5 B. & A. 117; it was discussed in Watters v. Smith, 2 B. & Ad. 889, and Haigh v. Brookes, 10 A. & E. 309, and approved in Wilkinson v. Byers, 1 A. & E. 106. This was an action of assumpsit; the declaration stated that T. R., as the defendant's attorney, had sued the plaintiff in the Palace Court for 13l. 10s., which action was depending; and thereupon, in consideration that the plaintiff would pay the defendant the 13l. 10s., the defendant promised the plaintiff to settle with the said attorney for the costs of the action, and indemnify the plaintiff against them; that plaintiff accordingly paid the 13l. 10s.; but that defendant neglected to settle with the attorney, who proceeded with the action and signed judgment against the plaintiff, who was obliged to pay 7l. 10s. costs, and 3l. in endeavoring to set aside the judgment. At the trial, it appeared that Byers, the present defendant, was a wood-turner, who had done work for Wilkinson, the present plaintiff, to recover a compensation for which the action had been brought. A verdict was found for the plaintiff, subject to the opinion of the court, upon the question, whether, as the payment of 13l. 10s. was a payment in discharge of an admitted debt, it could be any consideration for the defendant's promise to indemnify the plaintiff against the costs of the Palace Court action. The court held that the verdict was right. "The case," said Parke, J., "may be decided shortly on this ground. If an action be brought on a quantum meruit, and the defendant agree to pay a less sum than the demand in full, that is a good consideration for a promise by the plaintiff to pay his own costs, and proceed no further. Payment of a less sum than the demand has been held to be no satisfaction in the case of a liquidated debt; but where the debt is unliquidated, it is sufficient. Now, here we cannot say that there was originally any certain demand. A jury, if asked, could not, in my opinion, have said so. In the great majority of actions of this nature, for work, labor, and goods sold, it is not a specific sum that forms the subject-matter of the action; and, unless that could have been shown in the present case, there was a good consideration for the promise." Vide tamen per Littledale, J., in Wright v. Acres, 6 A. & E. 729. The principle laid down in Longridge v. Dorville was approved of in Atlee v. Backhouse, 3 M. & W. 651, per Parke, B. And in Sibree v. Tripp, 15 M. & W. 23. In Down v. Hatcher, 10 A. & E. 121, a plea of payment of 6l. 10s. in satisfaction of 200l. was held bad after verdict. No reason is assigned for the decision, but probably it may have proceeded on the ground that the plaintiff's demand (which was for use and occupation, agistment, and on an account stated) was primâ facie to be considered liquidated, and that if the amount was in dispute at the time of the accord, that ought to have been pleaded specially; in Wilkinson v. Byers, it will be remembered that the special matter appeared on the declaration. The case of Down v. Hatcher was doubted by Parke, B., in Cooper v. Parker, 15 C. B. 822.

In Edwards v. Baugh, 11 M. & W. 641, the declaration stated that disputes were pending between plaintiff and defendant as to whether defendant was indebted to plaintiff in 173l. 2s. 3d. for money lent, &c., and that, in consideration that the plaintiff would promise the defendant not to sue him for it, and would accept 100l. in satisfaction, the defendant promised to pay him 100l. This

was held bad on general demurrer, Lord Abinger saying that it might have been sufficient had the declaration shown some debt due and a dispute as to the amount. See, per Parke, B., Sibree v. Tripp, 15 M. & W. 36. Accordingly, where the declaration stated unsettled accounts and disputes concerning them, and mutual claims to the balance, and that in consideration that the plaintiff would relinquish all claims against the defendant, he promised, &c., it was held sufficient, Llewellyn v. Llewellyn, 3 Dowl. & L. 318, Patteson, J. [and in Cook v. Wright, 1 B. & S. 559; 30 L. J. Q. B. 321, where the plaintiffs, bonû fide believing the defendant to be liable to pay them certain expenses for which he was not, and believed himself not to be, liable, threatened him with legal proceedings, and he, by way of compromise, before any actual litigation, gave them some promissory notes, there was held to be sufficient consideration for the notes. See also Callisher v. Bischoffsheim, L. R. 5 Q. B. 449; 39 L. J. Q. B. 181; Ockford v. Barelli, 20 W. R. Ex. 116; cases which were questioned by Brett, L. J., in Exparte Banner, 17 Ch. D. 480; 51 L. J. Ch. 300, but approved by the L. JJ. in Miles v. New Zealand, &c., Co., 32 Ch. D. 266; 55 L. J. Ch. 801; Harris v. Venables, L. R. 7 Ex. 235; 41 L. J. Ex. 180]. And the suspension or abandonment of an action or suit is presumed to be a good consideration, unless the contrary distinctly appear, Smith v. Monteith, 13 M. & W. 427. And so is the withdrawal of a plea, according to Cooper v. Parker, 15 C. B. 822. See as to the effect of statement of an account, Callander v. Howard, 10 C. B. 290; Bridgman v. Dean, 7 Exch. 199 [Laycock v. Pickles, 4 B. & S. 497; 33 L. J. Q. B. 43; M'Kellar v. Wallace, 8 Moore, P. C. 378, 401; and Perry v. Attwood, 6 E. & B. 691].

In Sibree v. Tripp, 15 M. & W. 23; 15 L. J. Ex. 318, the case of Cumber v. Wane was much observed upon, and the decision qualified to this extent, that a negotiable security may operate, if so given and taken, in satisfaction of a debt of greater amount, the circumstance of negotiability making it, in fact, a different thing and more advantageous than the original debt, which was not negotiable. And Parke, B., observed upon Cumber v. Wane and Thomas v. Heathorn [2 B. & C. 477; 3 D. & R. 647], "The reasoning of Pratt, C. J., in the former case is certainly not correct, for we cannot inquire into the reasonableness of the satisfaction. But there it did not appear that the note was a negotiable one" [quære, see the argument]; "and the point now before the court was not made. In Thomas v. Heathorn it does not appear to have been a case of accord and satisfaction; although the bill accepted by the defendant was a negotiable security, it does not appear that it was given by way of accord and satisfaction." [And see Goddard v. O'Brien, 9 Q. B. D. 37.]

It was once thought that when, upon the dissolution of a firm, the partner who remained in trade agreed, as generally happens, to take upon himself the debts of the late firm, a creditor of the whole body would not, by assenting to this arrangement, discharge the retiring partner from liability: a notion principally founded on the decisions in David v. Ellice, 5 B. & C. 196; Lodge v. Dicas, 3 B. & A. 611; by which, however, it was not perhaps warranted to its full extent. This doctrine, which was based on a ground similar to that on which Cumber v. Wane was decided, viz. that there would be no consideration to the creditor for such an arrangement, had been much complained of, and at last came to be canvassed solemnly in Thompson v. Percival, 5 B. & Ad. 925; 3 N. & Man. 167. That was an action against James and Charles Percival, for goods sold and delivered. James pleaded bankruptey, on which the plaintiff as to him entered a nolle prosequi. Charles pleaded the general issue, and at the trial it appeared that James and Charles had been in partnership, which was dissolved in the usual way, James to continue in the business, and to receive and pay all

debts. At the time when notice of the dissolution was first given to the plaintiff, he had a demand on the firm, for which James told him he must look to him alone. He afterwards drew a bill on James for its amount, which was dishonored. Upon these facts, a verdict being found for the plaintiff, the court granted a new trial, in order that the jury might be asked whether the plaintiff had not agreed to accept the individual liability of James, instead of the joint liability of James and Charles; and it was held that, if that question should be answered in the affirmative, the defendant would be entitled to a verdict. "Many cases," said the Lord Chief Justice, delivering the judgment of the court, "may be conceived, in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties or the conveyance of the remedy, as in cases of bankruptcy, survivorship, or in various other ways; and whether it was actually more beneficial in each particular case cannot be made the subject of inquiry." Acc. Winter v. Innes, 4 Cr. & M. 109. In Kirwan v. Kirwan, 4 Tyrwh. 491, a similar point occurred. That case was decided upon special circumstances; but from it, as well as from Thompson v. Percival, the following rule may be collected: riz., that mere knowledge of such an arrangement amongst members of a partnership about to be dissolved will not bind the creditor of the firm, but that his own agreement to accept the transfer of liability will; and that the question whether he has or has not entered into such an agreement is a question proper to be decided upon by a jury. See Hart v. Alexander, 2 M. & W. 484; Powles v. Page, 3 C. B. 16; Lyth v. Ault, 7 Exch. 669.

There is another class of cases, also of frequent occurrence, and of great practical importance, which are exempted from the general doctrine laid down in Cumber v. Wane, though once supposed to fall within it; those, videlicet, in which a debtor has induced a number of his creditors to accept a composition amounting to less than their entire demand. Such an agreement, if entered into by a number of creditors, each acting on the faith of the engagement of the others, will be binding upon them; for each, in that case, has the undertakings of the rest as a consideration for his own undertaking, Reay v. White, 3 Tyrwh. 596; 1 C. & M. 748 [see the judgment in Boyd v. Hind, 1 H. & N. 938, where the plaintiff's agreement, if any, was not with the debtor but only with another of the creditors]. And so of an agreement to give time, Good v. Cheeseman, 2 B. & Ad. 328. [And of a resolution to accept a composition under the Bankruptcy Act, 1869, s. 126, until default made. Slater v. Jones, L. R. 8 Exch. 186; 42 L. J. Exch. 122.] But if one of the creditors be afterwards refused the benefit held out to him by the arrangement, it will cease to be binding on him, Garrard v. Woolner, 8 Bing. 258. So, if the consideration in any manner fails, the agreement is at an end. Thus, if some creditors sign on the faith that others will do so, if the others hold out, those who have subscribed already are not bound, Reay v. Richardson, 2 C. M. & R. 422. So if it purport to pass an interest in lands, but want the formalities required by the Statute of Frauds, it will not bind the creditors, Alchin v. Hopkins, 1 Bing. N. C. 99. Nor will the debtor be entitled to the benefit of it, if he neglect to perform accurately what is to be done on his part. Thus he must tender the composition money on the appointed day; for, as Lord Ellenborough said, in Cranley v. Hillary, 2 M. & S. 120, the party to be discharged is bound to do the act which is to discharge him, accord. Shipton v. Casson, 5 B. & C. 378; Wenham v. Fowle, 3 Dowl. 43; Rosling v. Muggaridge, 16 M. & W. 181; Evans v. Powis, 1 Exch. 601 [Fessard v. Mugnier, 18 C. B. N. S. 286; 34 L. J. C. P. 125; Edwards v. Coombe, 41 L. J. C. P. 202; L. R. 7 C. P. 519. In re Hatton, L. R. 7 Ch. 723; Goldney P. O. v. Lording, L. R. S Q. B. 182; 42 L. J. Q. B. 103; Exparte Peacock in Re Duffield,

L. R. 8 Ch. 682; Newell v. Van Praagh, L. R. 9 C. P. 96; 43 L. J. C. P. 94; Edwards v. Hancher, 1 C. P. D. 111, in which case the debtor in pursuance of a resolution under sect. 126 of the Bankruptcy Act, 1869, had given promissory notes with a surety for the instalments of a composition, and the creditors had given receipts "in discharge of their debts." The first of the notes was dishonored, and, though no demand was made on the surety, it was held that the plaintiffs might sue for the original debt.

Where the money for the composition had been paid by the debtor to the trustee, but the trustee, at the debtor's instance, had refused to pay it to the plaintiff, a creditor, it was held that the right of action for the original debt did not revive, Campbell v. Im Thurm, 1 C. P. D. 267; 45 L. J. C. P. 482, as to the other point decided in which case see the remarks of Lord Blackburn in Breslauer v. Brown, 3 App. Cas. 672.] But if the creditor have positively refused to accept less than his original demand, he is taken to have waived a tender, Reay v. White, 3 Tyrwh. 596; 1 C. & M. 748, S. C. See Cooper v. Phillips, 5 Tyrwh. 170 [and Hazard v. Mare, 6 H. & N. 434. It would seem that a formal tender is not necessary, but it is sufficient if the debtor be ready to pay and express his willingness to pay. Ex parte Hemmingway, 26 L. T. N. S. 298. Provision is made for compositions with creditors by ss. 18 and 23 of the Bankruptcy Act, 1883. By rule 211 (1886) it is provided that where a composition or scheme is sanctioned, and default is made in payment thereunder, either by the debtor or the trustee (if any), no action to enforce such payment shall lie, but the remedy of any person aggrieved shall be by application to the court.]

The general doctrine in Cumber v. Wane, and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows: viz., that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being nudum pactum. But if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement. See Steinman v. Magnus, 2 Camp. 124; 11 East, 390; Bradley v. Gregory, 2 Camp. 383; Wood v. Roberts, 2 Stark. 417; Boothby v. Sowden, 3 Camp. 175; Sibree v. Tripp, 15 M. & W. 23. This benefit however, or possibility of benefit, as pointed out by Lord Selborne in Foakes v. Beer, sup., "is not that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal."

It is laid down in most of the earlier authorities, that an accord to avail must be executed; and that doctrine is affirmed by Bayley v. Homan, 3 Bing. N. C. 915. See Allies v. Probyn, 5 Tyrwh. 1079; Edwards v. Chapman, 1 M. & W. 231; Reeves v. Hearne, 1 M. & W. 326; Collingbourne v. Mantell, 5 M. & W. 292 [Lynn v. Bruce, 2 H. Black. 317; Gabriel v. Dresser, 15 C. B. 622; Brown v. Perkins, 1 Hare, 564]. On the other hand, it is said in Com. Dig. B. 4, "An accord with mutual promises to perform is good, though the thing be not performed at the time of action, for the party had a remedy to compel the performance." See Good v. Cheeseman [and as to the statutory accord of the composition agreement under the Bankruptcy Act, Slater v. Jones, ubi supra]. The rational distinction seems to be, that if the promise be received in satisfaction, it is a good satisfaction; but if the performance, not the promise, is intended to operate in satisfaction, there shall be no satisfaction without performance. See Reeves v. Hearne, 1 M. & W. 326 [Buttigieg v. Booker, 9 C. B. 689]; per curiam Evans

v. Powis, ubi supra [Edwards v. Hancher, 1 C. P. D. 119]. The same distinction is made in the cases cited in the notes to Cutter v. Powell, post, vol. ii., where it is held that, where the promise on one side is the consideration for that on the other, performance is not a condition precedent to the right of action. [As to the distinction between terms "discharge," "satisfaction," and "payment," see the cases cited in Bottomley v. Nuttall, 5 C. B. N. S. 134, 135; and Cannan v. Wood, 2 M. & W. 465.]

It can hardly have failed to suggest itself to the observant reader of the principal case, that its doctrine is founded upon vicious reasoning and false views of the office of a court of law, which should rather strive to give effect to the engagements which persons have thought proper to enter into, than cast about for subtle reasons to defeat them upon the ground of being unreasonable. Carried to its full extent, the doctrine of Cumber v. Wane embraces the exploded notion, that, in order to render valid a contract not under seal, the adequacy as well as the existence of the consideration must be established. Accordingly, in modern times, it has been, as appears by the preceding part of the note, subjected to modification in several instances. The following is an attempt to exhibit an outline of the present state of the law as to the exoneration, satisfaction, or discharge of debts or demands [particularly those] not under seal:—

1. A person bound by a contract not under seal may, before breach, be exonerated from its performance by word of mouth, without any value or consideration. [Comyn's Dig. Action on the case upon assumpsit, Dobson v. Espie, 2 H. & N. 79.] A fortiori, it should seem that such exoneration may be purchased for a less amount than that contracted to be paid.

2. An unliquidated or uncertain and disputed demand overdue may be discharged by payment of any agreed sum.

3. An overdue demand, whether liquidated or unliquidated, may by agreement be discharged by payment of a thing different from that contracted to be paid, though of less pecuniary value; for instance, a thousand pounds by payment of a peppercorn, Pinnel's Case, 5 Rep. 117, Andrew v. Boughay, Dyer, 756; or by a negotiable instrument binding the debtor, or a third person, to pay a smaller sum, Curlewis v. Clark, 3 Exch. 375, [and] part of a claim [may be satisfied] by the withdrawal of defence as to the residue, Cooper v. Parker, 15 C. B. 822. And even a new binding contract entered into by the debtor with the creditor for a new consideration (see Lynn v. Bruce, 2 H. Bl. 317), to do something different from what the debtor was bound to by his original broken contract, as, for instance, that one of two joint debtors shall alone remain liable and pay the debt, Lyth v. Ault, 7 Exch. 669, may, if the new contract itself, not merely the performance of it, be agreed to be taken in satisfaction and discharge of the breach, operate according to the intention of the parties in such discharge, whether performed or not; the remedy for its breach being a thing of some value, and being different from the original debt. Evans v. Powis, 1 Exch. 601; Curlewis v. Clark, 3 Exch. 375; Flockton v. Hall, 16 Q. B. 1039.

4. There is authority for saying that a liquidated demand, founded upon a bill of exchange or promissory note, even though overdue, may be forgiven by word of mouth; and if this be law, a fortiori, such a demand might, with consent of the creditor, be discharged by payment of a less amount than that secured by the note. See Foster v. Dawber, 6 Exch. 839, in the marginal note of which for "before" read "after" [and the judgment of Willes, J., in Cook v. Lister, 13 C. B. N. S. 543. But where to an action on a promissory note by which defendant promised to pay a certain sum to J. M. or order on demand a written agreement was pleaded by which defendant agreed to pay J. M. a similar sum by quarterly instalments with interest, it was held to afford no answer. McManus v. Bark, L. R. 5 Ex. 65; 39 L. J. Ex. 65.]

- 5. The contract or other act of a third person introducing a new consideration. may operate in discharge of a demand arising out of any sort of contract not under seal, whether liquidated or unliquidated, if so agreed between such third person and the debtor and the creditor. See Henderson v. Stobart, 5 Exch. 99. Upon this rests the validity of a composition with creditors, by which two or more creditors agree with one another and the debtor to take less than the full amount of their respective debts in discharge of all. And in like manner it should seem that payment by a third person, not bound by the contract, with the assent of the debtor, of the amount due, or even less, see Welby v. Drake, 1 C. & P. 557, may operate to discharge the whole debt, if so intended. It is said, "with the assent of the debtor," because, although by the civil law a stranger might discharge a debt by payment without the knowledge and even against the wish of the debtor; yet, according to the authorities, it should seem that, by the law of England, the precedent or subsequent assent of the debtor (if capable of assenting) is necessary to the discharge of the debt. See Jones v. Broadhurst, 9 C. B. 173; Belshaw v. Bush, 11 C. B. 191; James v. Isaacs, 12 C. B. 791; Goodwin v. Cremer [18 Q. B. 757; and Walter v. James, L. R. 6 Exch. 124]. Quære, whether such assent of the debtor ought not to be presumed, the act of payment being for his benefit? [Cook v. Lister, 13 C. B. N. S. 543, judgment of Willes, J.; and Pellatt v. Boosey, C. B. 10 May, 1862; but see Lucas v. Wilkinson, 1 H. & N. 420. If the debtor at the request of the creditor agrees with the creditor's creditor to be liable to the latter in place of the creditor for the amount of the debt, this is evidence of a tripartite agreement for satisfaction of the debt, and ought to be pleaded as such averring that the creditor was a party thereto, Cockrane v. Green, 9 C. B. N. S. 448; 30 L. J. C. P. 97. See also Liversidge v. Broadbent, 4 H. & N. 603.]
- 6. A liquidated and undisputed money demand, of which the day of payment is past, not founded upon a bill of exchange or promissory note, cannot, even with the consent of the creditor, be discharged by mere payment by the debtor of a smaller amount in money, in the same manner as he was bound to pay the whole, Foakes v. Beer, ubi sup.
- 7. A contract to do an act in futuro, in satisfaction of a past breach of contract resulting in damages, whether liquidated or unliquidated, is revocable, and indeed inoperative, until actual performance, unless the contract itself, and not merely the performance of it, is agreed to be accepted in satisfaction, Lynn v. Bruce, 2 H. Bl. 317; Graham v. Gibson, 4 Exch. 768. Yet such a contract may be enforced by action where there is a new consideration, as staying an action brought, &c., Crowther v. Farrer, 15 Q. B. 677 [and see Jonassohn v. Ransome, 3 C. B. N. S. 779, where the court allowed an executory accord to be pleaded as an equitable defence].
- 8. A contract, though for valuable consideration, to suspend for a time rights of action once vested, is not a defence at the common law, but only ground for a cross action [for since a right of action if barred for however short a period is in law extinguished, to give effect to this defence would be to hold the right of action wholly destroyed contrary to the intention of the parties], Ford v. Beech, 11 Q. B. 852 [Webb v. Salmon, 13 Q. B. 886, 894; 3 H. of Lords' Cases, 510; Frazer v. Jordan, E. B. & E. 8; Ray v. Jones, 19 C. B. N. S. 416, 34 L. J. C. P. 306; semble, such a contract would have been a defence on equitable grounds, under the 17 & 18 Vict. c. 125, s. 83, to an action brought in violation of it; for in Chancery the breach of an express negative promise is usually restrainable by perpetual injunction. See per Crompton, J., in Keyes v. Elkins, 5 B. & S. 240; 34 L. J. Q. B. 28; Lumby v. Wagner, 1 De G. Mac. & G. 604; Peto v. Brighton, &c., Railway Co., 32 L. J. Ch. 677; Norton v. Wood, 1 Russ. & M.

178; Same v. Same, 21 L. J. Cha. 900; but in those cases in which the injunction would only be granted conditionally, on terms which a court of law had not jurisdiction to enforce in the action, such a contract was not an equitable defence; see Flight v. Gray, 3 C. B. N. S. 320; but see now 36 & 37 Vict. c. 66 (The Judicature Act) s. 24, cited infra. But the parties may by their own covenant stipulate that such an agreement may be pleadable in bar in the event of an action being brought, and it then operates as a defeasance, see Gibbons v. Vouillon, 8 C. B. 483; Legg v. Cheesebrough, 28 L. J. C. P. 209; Walker v. Nevill, 3 H. & C. 403; 34 L. J. Exch. 73. And the distinction is to be observed between agreements to suspend and thereby extinguish rights of action, and those which operate only as releases with a condition subsequent, by which latter the right of action is not extinguished, but may be put in force on failure of the condition. See Newington v. Levy, L. R. 5 C. P. 607, 6 C. P. 180; Slater v. Jones, L. R. 8 Ex. 186, 42 L. J. Ex. 122; Jeffs v. Day, L. R. 1 Q. B. 372; Edwards v. Coombe, L. R. 7 C. P. 519, 41 L. J. C. P. 202; Edwards v. Hancher, 1 C. P. D. 111. Such was the effect of the statutory accord in cases of composition under s. 126 of the Bankruptcy Act, 1869, which differed from a common-law accord and satisfaction in that the right of action was barred by the agreement until default, and yet revived upon default. Ibid., see the remarks of Lord Blackburn in Brown v. Breslauer, 3 App. Cas., at p. 705. An absolute covenant not to sue is in order to avoid circuity of action pleadable as a release. See 2 Wms. Saund. 140, 447, ed. 1871, Willis v. De Castro, 4 C. B. N. S. 216; 27 L. J. C. P. 243. As to stipulations which do not suspend the remedy, but qualify the original rights, see Foley v. Fletcher, 28 L. J. Exch. 100; or suspend the operation of agreements, Wallis v. Littel, 11 C. B. N. S. 369.

The rule above mentioned, that a cause of action once barred is extinguished, does not apply to the right of a landlord who has distrained, to sue for rent remaining unsatisfied after the distress has been realized; though he can bring no action while he holds the distress, *Lehain* v. *Philpott*, L. R. 10 Ex. 242; *Philpott* v. *Lehain*, 35 L. T. N. S. 855.

In Scott v. Avery, 5 H. of Lords Cases, 811, a proviso that the assured should not be entitled to sue on his policy, until the amount of his claim was ascertained by arbitration, was held to be valid. For, though the parties cannot, by mere agreement, oust the jurisdiction of the courts of law, it is nevertheless competent for them to stipulate that a reference to arbitration shall be a condition precedent to a right of action. See also Scott v. The Corporation of Liverpool, 3 De G. & J. 334; Tillett v. Charing Cross Bridge Co., 26 Beav. 412; and Horton v. Sayer, 4 H. & N. 643; S. C. 29 L. J. Exch. 28; Braunstein v. The Accidental Death Ins. Co., 1 B. & S. 782; 31 L. J. Q. B. 17; Tredwen v. Holman, 1 H. & C. 72; 31 L. J. Exch. 398; and Lee v. Page, 30 L. J. Ch. 857; Dawson v. Fitzgerald, 1 Ex. D. 257; Edwards v. Aberayron, &c., Society Limited, 1 Q. B. D. 563. For an instance of an action for the breach of an agreement to refer, see Livingston v. Ralli, 5 E. & B. 132; such an agreement or the pendency of an arbitration under it would seem not to be pleadable by way of equitable defence, Wood v. Copper Miners' Co., 17 C. B. 561.

However, by the Common Law Procedure Act, 1854, s. 11, if the parties to any deed or instrument in writing (Mason v. Haddan, 6 C. B. N. S. 526; Randell v. Thompson, 1 Q. B. D. 748, overruling Blyth v. Lafone, 1 E. & E. 435; Moffat v. Cornelius, 39 L. T. N. S. 102) have agreed to refer any existing (Russell v. Pellegrini, 6 E. & B. 1020; Wickham v. Harding, 28 L. J. Exch. 215) or future differences to arbitration, and an action is brought notwithstanding the agreement, the court, or a judge of the court in which the action is brought may, after appearance entered by the defendant, and before plea, stay

the proceedings, upon being satisfied that no sufficient reason exists why the matters agreed to be referred cannot be or ought not to be referred, and that the defendant was, at the time of the suit, and still is, ready to join in the arbitration. For instances of the application of this section, see Willesford v. Watson, L. R. 8 Ch. 473; Piercy v. Young, 14 Ch. D. 200; Plews v. Baker, L. R. 16 Eq. 564; Law v. Garrett, 8 Ch. D. 26, and Hodyson v. Rail. Passenger Ass. Co., 9 Q. B. D. 188, decided upon a private Act similarly worded.]

9. With respect to contracts under seal, they in this respect differ considerably from those not under seal. Generally speaking, a liability under them could not at the common law be discharged by a mere license not under seal even for valuable consideration, or even by accord and satisfaction before breach, Mayor of Berwick v. Oswald, 1 E. & B. 295; Spence v. Healey, 8 Exch. 668; and after breach, those claims arising out of them which sounded in damages, and not debts accruing by the execution of the deed only, could be the subject of accord and satisfaction, Blake's Case, 6 Rep. 44; Selw. N. P. "Covenant," vii. 1: Bac. N. Abr. "Accord." (B.) Contracts under seal to pay liquidated amounts in money, before 4 Anne, c. 16, could only be satisfied, so as to enable the debtor to defend himself in a court of common law, by payment on the day, and an acquittance under seal, which, if tendered by the debtor, the creditor was bound to execute, and a payment in part after the day was only ground of equitable relief. See Husband v. Davis, 10 C. B. 645, as to the effect of that statute. The case of Smith v. Trowsdale, 3 E. & B. 83, in which an extension by parol of the time stipulated for the performance of a contract under seal was upheld upon peculiar grounds, seems to touch the extreme limit of the common law.

[And now by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, subs. 2, it is enacted "that if any defendant claims to be entitled to any relief upon any equitable ground against any deed, instrument, or contract, or alleges any ground of equitable defence to any claim of the plaintiff, the court shall give to every equitable defence so alleged, such and the same effect by way of defence against the claim as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that court for the same or the like purpose before the passing of the Act," Mostyn v. West Mostyn Coal Co., 1 C. P. D. 145.

And by subs. 3 "the courts respectively shall have power to grant to any defendant in respect of any right or other matter of equity, such relief against any plaintiff as such defendant shall have properly claimed by his pleading, and as the said courts respectively might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff."

By subs. 4, "the said courts shall recognize all equitable estates, titles, and rights, and all equitable duties appearing incidentally in the course of any cause in the same manner as the Court of Chancery would have recognized them."

By s. 5, "every matter of equity on which an injunction against the prosecution of any cause might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto."]

The second point decided in this case is an exemplification of that maxim of law—Actus curiæ nemini facit injuriam, for the delay is the act of the court, therefore the parties should not suffer by it. Acc. Toulmin v. Anderson, 1 Taunt. 385. See Lanman v. Lord Audley, 2 M. & W. 535; Vaughan v. Wilson, 4 Bing. N. C. 116; Evans v. Rees, 12 A. & E. 167; Miles v. Bough, 3 Dowl. & L. 105; Harrison v. Heathorn, 6 Scott N. R. 794 [Miles v. Williams, 9 Q. B. 47]; Moore v. Roberts, 3 C. B. N. S. 844. The practice only prevails in cases of

delay by the act of the court: Wilkes v. Parks, 5 M. & Gr. 376; 6 Sc. N. R. 42, S. C.; Fishmongers' Co. v. Robertson, 3 C. B. 970 [Seymour v. Greenwood, 30 L. J. Exch. 189; Heathcote v. Wing, 25 L. J. Exch. 23; Turner v. London & South-Western Rail. Co., L. R. 17 Eq. 561].

Accord and satisfaction is the acceptance of a new and valid promise, which operates as an extinguishment of an existing claim, or contract, or cause of action, and which can be enforced in substitution therefor; Goodrich v. Stanley, 24 Conn. 613; Bull v. Bull, 43 Conn. 455; Boston Rubber Co. v. Peerless Wringer Co., 58 Vt. 551; Whart. Contr. § 996. The promise must be founded upon a new consideration, and it must be accepted by the creditor as a satisfaction; Merry v. Allen, 39 Iowa 235; Preston v. Grant, 34 Vt. 201. It is a defence which could, at common law, be given in evidence under the general issue in assumpsit and in actions on the case; but in debt, covenant, and trespass it had to be specially pleaded; 2 Greenl. Evid. § 29. The American authorities have, to some extent, departed from this rule; and while, in some States, accord and satisfaction may still be given in evidence under the general issue, Burge v. Dishman, 5 Blackf. 272, yet, in others, it must, in all cases, be specially pleaded; Wheaton v. Nelson, 11 Gray 15; Parker v. Lowell, Id. 353; Grinnell v. Spink, 128 Mass. 25; Brett v. Universalist Soc., 63 Barb. 610; Kenyon v. Sutherland, 3 Gilm. (Ill.) 99; Phillips v. Kelly, 29 Ala. 628; and should state specifically, not only that the goods or other things were delivered in payment of the demand, but it must also aver that they were accepted in satisfaction and discharge thereof; Morris Canal v. VanVorst, 1 Zab. 100. In some cases it has been permitted to be given in evidence under the special plea of payment; Hamilton v. Moore, 4 W. & S. 570; Richabaugh v. Dugan, 7 Barr. 394; Buddieum v. Kirk, 3 Cr. 293.

The distinction between accord and satisfaction and the closely allied defences of release and payment should be noticed. The first is the act of both parties agreeing upon and accepting something new in satisfaction and extinguishment of the old claim. Release is the act of the creditor alone, whereby the remedy on the original claim is barred and extinguished, either with or without new consideration. Payment is the act of the debtor alone, and is the fulfilment of the original contract

according to the time and manner therein prescribed. Accord and satisfaction is a good plea to an action of covenant after breach, but not before; Harper v. Hampton, 1 Har. & J. 675; Smith v. Brown, 3 Hawks 580. But evidence of the rescission of a contract will not support this plea; Barelli v. O'Conner, 6 Ala, 617.

New consideration must appear. — In order to sustain the plea of accord and satisfaction it must appear that the satisfaction was accepted at a time subsequent to the making of the original contract, but the time when the accord was entered into is immaterial; Blinn v. Chester, 5 Day 359. And the accord must appear to be advantageous to the creditor, and to be something to which he had before no title; otherwise it can be no satisfaction.

Therefore, in trespass for taking plaintiff's cattle, it is no good plea to say that there was an accord that he should have his cattle again, for this is not any satisfaction; Keeler v. Neal, 2 Watts 424; Ritter v. Singmaster, 73 Penn. St. 400; Cook v. Barnes, 36 N. Y. 520; Emerine v. O'Brien, 36 Ohio St. 491; Maddux v. Bevan, 39 Md. 485, citing Booth v. Campbell, 15 Md. 569; Merry v. Allen, 39 Iowa 235; Bright v. Coffman, 15 Ind. 371. Therefore, to say "it is not enough, but there will be no trouble," at the time of accepting part payment, is not an acceptance in satisfaction; Willey v. Warden, 27 Vt. 655.

Accord must be executed. — It must further appear that the accord, being a promise to confer satisfaction, has been fully and actually accepted and executed; Cushing v. Wyman, 44 Me. 121; Young v. Jones, 64 Me. 563; Burgess v. Denison Mfg. Co., 79 Me. 266; Woodward v. Miles, 24 N. H. 289; Watson v. Elliott, 57 N. H. 511; Tuckerman v. Newhall, 17 Mass. 581; Clifton v. Litchfield, 106 Mass. 34; Pettis v. Ray, 12 R. I. 344; Scutt's Appeal, 43 Conn. 108; Anderson v. Highland Turnpike Co., 16 Johns. 86; Hawley v. Foote, 19 Wend. 516; Hearn v. Kiehl, 38 Penn. St. 147; Jackson v. Olmstead, 87 Ind. 92; Simmons v. Clark, 56 Ill. 96; Schlitz v. Meyer, 61 Wisc. 418; Ogilvie v. Hallam, 58 Ia. 714; Pope v. Tunstall, 2 Pike 209; Guion v. Doherty, 43 Miss. 538. The plea must aver both the accord and satisfaction; Maze v. Miller, 1 Wash. C. C. 328; Morris Canal v. Van Vorst, supra; Sinard v. Patterson, 3 Blackf. 353; and the averment must be proved; Browning v. Crouse, 43 Mich. 489. And if the plaintiff is compelled, in making out

his own case, to get rid of an accord, his evidence should go far enough to make out at least a primâ facie case against it; Ibid. It is insufficient, in general, to aver that the plaintiff agreed to accept something in satisfaction; Johnson v. Hunt, 81 Ky. 321. Where, however, the agreement is expressly received in satisfaction of the debt, as it may be, and sometimes is, then the agreement alone may be considered as an accord and satisfaction, and the original cause of action be discharged whether the new contract is ever performed or not. But it must rest upon a new and adequate consideration; Warren v. Skinner, 20 Conn. 559; Woodward v. Miles, 24 N. H. 289; Simmons v. Clark, 56 Ill. 96; Overton v. Conner, 50 Tex. 113. In the same way mutual promises to perform, on which both parties have a legal remedy for non-performance on the part of the other, are a satisfaction of debt, if so accepted, although such promises are not performed; Goodrich v. Stanley, supra; Babcock v. Hawkins, 23 Vt. 561; Woodward v. Miles, supra.

Entire performance.— The entire agreement must be executed, and if any part of the consideration fails a plea of part performance is no bar to a recovery on the original claim; Sprune-berger v. Dentler, 4 Watts 126. "It is not enough that the satisfaction is in part good, but it must be entirely and completely so;" Nave v. Fletcher, 4 Litt. 242. Nor is a plea of readiness to perform, or a tender of performance, sufficient; Clark v. Dinsmore, 5 N. H. 136; Kromer v. Heim, 75 N. Y. 574; Terrett v. Brooklyn Co., 87 N. Y. 92; Hawley v. Foote, 19 Wend. 516; Simmons v. Clark, 56 Ill. 96. Such a plea is demurrable; Moss v. Shannon, 1 Hilt. (N. Y.) 175. But see Spruneberger v. Dentler, supra; Schweider v. Lang, 29 Minn. 254; and Rising v. Patterson, 5 Whart. 316, where it seems to be held that a tender in all respects, as to time and amount, according to the agreement would be sufficient.

Adequacy of the satisfaction.— In the principal case it is said that "as the plaintiff had a good cause of action, it can only be extinguished by a satisfaction he agrees to accept, and it is not his agreement alone that is sufficient, but it must appear to the court to be a reasonable satisfaction." And in Pinnel's Case, "payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." These cases have been

recognized by many American decisions as leading and settled authorities, and have been followed in Maine: Bailey v. Day, 26 Me. 88; White v. Jordan, 27 Me. 370. Vermont: Bowker v. Harris, 30 Vt. 424. Massachusetts: Donohue v. Woodbury, 6 Cush. 150; Smith v. Bartholomew, 1 Met. 276; Harriman v. Harriman, 12 Gray 341; Lathrop v. Page, 129 Mass. 19; Hastings v. Lovejov, 140 Mass. 261. Connecticut: Warren v. Skinner, 20 Conn. 559; Rose v. Hall, 26 Conn. 392. New York: Dederick v. Leman, 9 Johns. 333; Seymour v. Minturn, 17 Johns. 169; Moss v. Shannon, 1 Hilt. 175. New Jersey: Daniels v. Hatch, 21 N. J. Law 391. Pennsylvania: Spruneberger v. Deutler, supra; Rising v. Patterson, supra. South Carolina: Eve v. Mosely, 2 Strobh. 203. Maryland: Jones v. Ricketts, 7 Md. 108; Gurley v. Hiteshue, 5 Gill. 217. Alabama: Pearson v. Thomason, 15 Ala. 700. Illinois: Curtiss v. Martin, 20 Ill. 557. Iowa: Rea v. Owens, 37 Iowa 262. Kansas: St. Louis, &c., R. R. v. Davis, 35 Kans. 464. But it is to be noticed that these are largely early cases. In many of these States, attempts have been made in later decisions to overthrow this rule. The foundation of it seems to be that "in the case of the acceptance of a less sum of money in discharge of a debt, inasmuch as there is no new consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate, with legal impunity, his promise to his debtor, however freely and understandingly made. This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever the technical reason for its application does not exist, the rule itself is not to be applied. Hence judges have been disposed to take out of its application all those cases where there was any new consideration or any collateral benefit received by the payee which might raise a technical legal consideration, although it was quite apparent that such consideration was far less than the amount of the sum due;" Brooks v. White, 2 Met. 283. So that even where the rule prevails it is overburdened with qualifications, nice distinctions, and equivocal approbations, and courts are not unready to find grounds for avoiding its application. In Mitchell v. Wheaton, 46 Conn. 315, the defendant, pendente lite, paid \$150, with the costs and expenses of the suit, in satisfaction of a claim of \$299 — and the plaintiff was held to be barred from recovering the balance. The costs of the pending suit the defendant did

not, at the time, owe the plaintiffs, and it was not certain that he ever would. That would depend upon the result of the suit. But the defendant not only paid the costs of the suit but the expenses also, which never could have been recovered of him. It was held that there was clearly a sufficient consideration for a valid accord and satisfaction. And a similar decision on much the same state of facts was rendered in Harper v. Graham, 20 Ohio 105, where the court vigorously attacked the rule. In Kellogg v. Richards, 14 Wend. 116, it is called technical, and not very well supported by reason, and it is said that courts have departed from it upon very slight distinctions; Pardee v. Wood, 8 Hun. 584; Memphis v. Brown, 1 Flipp. 188; Smith v. Ballou, 1 R. I. 496. In other States such transactions have been given the effect of accord and satisfaction by express legislative enactment. "Whatever may have been the law as to the effect of payment of part of the demand in lieu of the whole, and as a discharge of the whole, before the statute of June 3, 1851, c. 213, it is now the law that no action can be maintained in any court of this State on a demand or claim which has been settled, cancelled, or discharged by a receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration however small;" Weymouth v. Babcock, 42 Me. 43; Mayo v. Stevens, 61 Me. 562; McArthur v. Dane, 61 Ala. 539; Memphis v. Brown, supra. But if a release is given under seal, it imports consideration and is a good discharge of the whole; Rising v. Patterson, 5 Whart. 316: Gordon v. Moore, 44 Ark. 349.

Collateral payment. — If payment be in a manner collateral to the original obligation, as if it be paid before the day, it will, if so accepted, be a valid discharge of the whole debt; Goodnow v. Smith, 18 Pick. 414; Harriman v. Harriman, 12 Gray 341; Brooks v. White, supra; Rose v. Hall, 26 Conn. 392; Very v. Levy, 13 How. 345; Hutton v. Stoddart, 83 Ind. 539; Spann v. Baltzell, 1 Fla. 301; Schweider v. Lang, 29 Minn. 254. It is a new duty undertaken by the debtor which is, or may be, burdensome to him or beneficial to the creditor, and a new consideration arises out of such undertaking, and sustains the agreement of the creditor; Rose v. Hall, supra. In Bowker v. Childs, 3 Allen 434, payment of less than the face of four promissory notes, three of which were not then due, was held a good accord and satisfaction of them all on their being given

up to the maker. Payment at another place is also sufficient; Smith v. Brown, 3 Hawks 580; Pope v. Tunstall, 2 Pike 209; Jones v. Perkins, 29 Miss. 139. Where a creditor agrees to remit a part of his claim if the balance is paid by a certain time, the condition must be strictly performed; Robertson v. Campbell, 2 Call (Va.) 421. The acceptance of a chattel or anything different from that contracted to be paid, irrespective of its value, such as a horse in lieu of money, Musgrove v. Gibbs, 1 Dall. 216; or services, Blinn v. Chester, 5 Day 359; or land, Eaton v. Lincoln, 13 Mass. 424; Howe v. Mackay, 5 Pick. 44; Savage v. Everman, 70 Penn. St. 315; or payment of the costs of an action, Baum v. Buntyn, 62 Miss. 110, is good as an accord and satisfaction. Such an agreement is executed by a delivery to the person appointed by the party to receive it; Anderson v. Highland Turnpike Co., 16 Johns. 86. According to the doctrine of Sibree v. Tripp, it has been held that the giving of the debtor's own negotiable promissory note will, if so accepted, operate as an accord and satisfaction. Nevertheless, judicial opinion has been somewhat divided as to the legal effect of this transaction. In some jurisdictions it is held that giving a note for a precedent debt does not primâ facie operate as an absolute payment, but rather as an extension of credit or as conditional payment. And if the note at maturity is not paid, the creditor has his election to pursue his remedy on it or on the original cause of action; Elliot v. Sleeper, 2 N. H. 525; Jaffrey v. Cornish, 10 N. H. 505; Wilbur v. Jernegan, 11 R. I. 113; Nightingale v. Chafee, Id. 609; Brabazon v. Seymour, 42 Conn. 551; Putnam v. Lewis, 8 Johns. 389; Frisbie v. Larned, 21 Wend. 450, and cases cited; Hawley v. Foote, 19 Wend. 516; Cole v. Sackett, 1 Hill 516; Myers v. Wells, 5 Hill 463; Feldman v. Beier, 78 N. Y. 293. But he will not be suffered to recover on the original cause of action unless he can show the note to have been lost or destroyed, or else produces it at the trial to be cancelled; Kemmil v. Wilson, 4 Wash. C. C. 308; Hughes v. Wheeler, 8 Cow. 77; Glenn v. Smith, 2 Gill & J. 493; Dayton v. Trull, 23 Wend. 345; Harris v. Johnston, 3 Cr. 311; Cocke v. Chaney, 14 Ala. 65, and cases cited. On the other hand, the Supreme Court of the United States has held in The Kimball, 3 Wall. 37, that the express agreement of the parties will be sufficient to give to this transaction the effect of a satisfaction and discharge of the debt. And in harmony

with this decision are the following State authorities: Schanck v. Arrowsmith, 9 N. J. Eq. 314; Wildrick v. Swain, 34 N. J. Eq. 167; Glenn v. Smith, supra; Hill v. Sleeper, 58 Ind. 221; Bristol Co. v. Probasco, 64 Ind. 406; Jeffries v. Lamb, 73 Ind. 202; Edwards v. Trulock, 37 Iowa 244, and cases cited; Day v. Thompson, 65 Ala. 269; Guion v. Doherty, 43 Miss. 538; Buckingham v. Walker, 48 Miss. 609; Block v. Dorman, 51 Mo. 31. And such appears to be the law in Pennsylvania; Hays v. M'Clurg, 4 Watts 452; Weakly v. Bell, 9 Watts 273; Darlington v. Gray, 5 Whart. 487. See Hooker v. Hyde, 61 Wisc. 204. A late case in Pennsylvania, Bank v. Huston, 11 Wkly. Notes Cas. 389, has gone so far as to hold that the debtor's negotiable note for less than the full amount of the debt is good as an accord and satisfaction, the reasons assigned by the court being that, as the debt is thereby liquidated, the remedy is made more simple, which fact, coupled with the better chance of disposing of the note in the market, makes it a more valuable security than the simple debt. This case is supported by Curlewis v. Clark, 3 Exch. 375. The Massachusetts doctrine goes still further, for, in an early case, Johnson v. Johnson, 11 Mass. 359, it was decided that a negotiable promissory note, given by a party chargeable upon an original simple contract and accepted by the other party, is a discharge of the original contract unless it be proved not to have been the intention of the parties to give it that effect. But in Dodge v. Emerson, 131 Mass. 467, the court say that this is not a conclusive presumption. It may be rebutted and controlled by proof. If there is any evidence tending to show that it was not so accepted, the question should be submitted to the jury; Curtis v. Hubbard, 9 Met. 322. A similar doctrine is held in Maine; Varner v. Nobleborough, 2 Greenl. 121, and Descadillas v. Harris, 8 Greenl. 298; — and in Illinois, Gage v. Lewis, 68 Ill. 604; Simmons v. Clark, 56 Ill. 96.

Satisfaction by third parties.—In the early English cases it was adjudged that an accord and satisfaction moving from one who was a stranger and in no sort privy to the condition of the obligation could not be pleaded in bar by the obligor; Grymes v. Blofield, Cro. Eliz. 541; Edgecomb v. Rodd, 5 East 294. This doctrine has been recognized in this country in Clow v. Borst, 6 Johns. 37; Daniels v. Hollenback, 19 Wend. 408; Stark v. Thompson, 3 T. B. Mon. 296. "But the correct doc-

trine would appear to be that satisfaction made by a stranger to a party having a cause of action and adopted by the party liable to the action is a good bar to an action for such cause;" Chitty on Contr. 11th Am. ed. 1133; Bennett v. Hill, 14 R. I. 322; Schmidt v. Ludwig, 26 Minn. 85; Gordon v. Moore, 44 Ark. 349. The reason of the old rule appears to have been that the person from whom the accord and satisfaction comes is not privy to the contract giving rise to the debt. This might give just cause to the creditor to refuse to receive satisfaction from a stranger or third person not known in the transaction of the parties. But where he has actually received and accepted the contribution in satisfaction of the debt, to allow him to maintain an action on the same debt afterward would seem to shock the ordinary sense of justice of every man; Leavitt v. Morrow, 6 Ohio St. 71; Smith v. Ballou, 1 R. I. 496; Lee v. Oppenheimer, 32 Me. 253. The debtor's own note with sureties or indorsers is also good as an accord and satisfaction; Schmidt v. Ludwig, supra; Mason v. Campbell, 27 Minn. 54; Booth v. Smith, 3 Wend. 66; N. Y. Bank v. Fletcher, 5 Wend. 85; Frisbie v. Larned, 21 Wend. 450; Bullen v. McGillicuddy, 2 Dana 90; Nevins v. Depierries, 1 Edm. Sel. Cas. 196. Where a debtor gives his note indorsed by a third person as a further security for a part of his debt which is accepted by the creditor in full satisfaction, it is a valid discharge of the whole of the original debt, and may be pleaded in bar as an accord and satisfaction; Boyd & Suydam v. Hitchcock, 20 Johns. 76; Varney v. Conery, 77 Me. 527; Dolsen v. Arnold, 10 How. Pr. 528. It has been said that there is little ground for distinction between this decision and the case where a less sum of money is paid and agreed to be accepted in full, which would not be a good plea; Kellogg v. Richards, 14 Wend. 116; Guild v. Butler, 127 Mass. 386. The note of a third person, if so accepted and paid, will be held a satisfaction of a judgment debt, though of less amount than the judgment; Sanders v. Bank at Decatur, 13 Ala. 353; Webb v. Goldsmith, 2 Duer 413. for any reason, the note of the third person is void, such as by reason of infancy, there is no satisfaction; Wentworth v. Wentworth, 5 N. H. 410. But where the debtor's wife signed the note in good faith as surety, although it could not be enforced against her, yet being, in the supposition of the parties, valid, and having been paid by her out of property

of her own in which the husband had no right or interest, it was held to be a payment by a third person as to whom an attempt to seek enforcement of payment of the balance would be a fraud; Bowker v. Harris, 30 Vt. 424.

When the note of a third person is given in satisfaction of a claim, the same question as in the case of the debtor's own note arises as to its legal effect. Whether it shall be considered as absolute payment or merely as collateral security is a question of intention depending upon the facts of each particular case. In the absence of evidence tending to show an intention to pay and receive the securities assigned as satisfaction of the debt in whole or in part, the law presumes that they were assigned only as collateral. The duty of establishing the contrary is affirmative, and it rests upon the debtor; Eby v. Hoopes, 1 Pennypacker 175; Frisbie v. Larned, 21 Wend. 450. In Wilhelm v. Schmidt, 84 Ill. 183, it is said, "the mere acceptance by the creditor of a negotiable note of a third person makes it but collateral security." Consequently it cannot be considered as payment or satisfaction of the original debt, or as operating even to suspend the plaintiff's remedy to enforce the payment of it; Kemmil v. Wilson, 4 Wash. C. C. 308; Bank of Pennsylvania v. Potius, 10 Watts 148; Weakly v. Bell, 9 Watts 273. If collaterals which are placed in the hands of the creditor are lost by his negligence, the debt is extinguished; Bank of U.S. v. Peabody, 20 Penn. St. 454. But if the intention of the parties, as indicated by the circumstances of the case, is that the note is to be in payment or satisfaction, the further question arises whether this effect is to be given to it immediately and absolutely, or conditionally. It may, under certain circumstances, be a satisfaction absolutely. If it be passed at the time of making a purchase or otherwise contracting a debt, there seems to be a natural presumption of an intention that it should be in discharge of the debt, and that appears to be the general effect of the adjudged cases. It will also be a satisfaction absolutely if it is so intended, but there must be an agreement to that effect, either express or to be inferred plainly from the circumstances and conduct of the parties; Brown v. Jackson, 2 Wash. C. C. 24; James v. Hackley, 16 Johns. 273; Tobey v. Barber, 5 Johns. 68; Hays v. Stone, 7 Hill 128; Whitbeck v. Van Ness, 11 Johns. 409; McIntyre v. Kennedy, 29 Penn. St. 448; Perit v. Pittsfield, 5 Rawle 166; Glenn v. Smith, 2 Gill & J. 493; Gordon v. Price, 10 Ired. 385; Moore v. Briggs, 15 Ala. 24, and cases cited. In such cases no action can be maintained on the original debt unless the note be a forgery, or fraud be committed in the transfer by false representations as to its value; Fulford v. Johnson, 15 Ala. 385; Markle v. Hatfield, 2 Johns. 455; Wilson v. Foree, 6 Johns. 110.

In Massachusetts, as has been previously stated, the giving of the debtor's own negotiable note is evidence of the payment of a preëxisting debt unless there is something to show that such was not the intention of the parties. This rule has been applied to the note of a third person so given; Ely v. James, 123 Mass. 36. But if given for a previous note, the latter being retained by the payee, the law does not raise the presumption of payment, and the question of intention is left to the jury; Woods v. Woods, 127 Mass. 141; Brigham v. Lally, 130 Mass. 485. The current of authorities in the case of a preexisting debt is, however, the other way, the presumption of law being that the bill or order is taken as conditional payment only, and the burden of proving an agreement that the note shall operate as absolute satisfaction is on the defendant; Haines v. Pearce, 41 Md. 221, and cases cited. Therefore, if a note for a less amount is taken in full satisfaction of the plaintiff's indebtedness, "if paid at maturity and not otherwise," the note not being paid at maturity, the plaintiff has a right to avail himself of this condition to recover the whole original indebtedness; Conkling v. King, 10 Barb. 372. But where, as in this case, the condition has been performed, although after the day, the payment becomes absolute, and an action for the balance of the original demand cannot be maintained. If the note operates as a satisfaction when it is paid, it can be construed only as a suspension of the plaintiff's right to proceed upon the account, but not as a satisfaction, until the note is paid; Proctor v. Mather, 3 B. Mon. 353; Tyson v. Pollock, 1 Penn. 375; Chapman v. Steinmetz, 1 Dall. 261; Okie v. Spencer, 2 Whart. 253. If it appear that, in consequence of the laches of the creditor who receives the bill, an injury such as loss of recourse against the person from whom it was received or the drawer or endorsers has resulted to the debtor, and he has had to pay the bill, the payment will be considered absolute. Due diligence must therefore be used to collect the money on the note; Clark v. Young, 1 Cr. 181; Dayton v. Trull, 23

Wend. 345; M'Lughan v. Bovard, 4 Watts 302; Taylor v. Daniel, 9 B. Mon. 53. And the question of diligence is for the jury; Snyder v. Findley, 1 N. J. Law 48. Fraud or false representations will render the acquittance void; Snyder v. Findley, supra.

If a check be given in payment for a preëxisting debt, the debt will still exist if the check is not good. "Unless a check be paid, it is no payment," Kent, C. J., in The People v. Howell, 4 Johns. 296; Patton v. Ash, 7 S. & R. 116; The People v. Baker, 20 Wend. 602; Stevens v. Park, 73 Ill. 387; Phillips v. Bullard, 58 Ga. 256.

Unliquidated and contested claims. — If the sum due is uncertain or contested, an agreement to pay and actual payment of a sum agreed on, though less than the demand, and a receipt in full is a good discharge of the whole claim; Rising v. Patterson, 5 Whart. 316; Tompkins v. Hill, 145 Mass. 379. And the principle of Cumber v. Wane does not apply to an unliquidated claim for damages; Donohue v. Woodbury, 6 Cush. 148; nor to an agreement made in compromise of a doubtful claim on sufficient consideration; Tuttle v. Tuttle, 12 Met. 551; Hilliard v. Noyes, 58 N. H. 312; Bull v. Bull, 43 Conn. 455; U. S. v. Child, 12 Wall. 232; McDaniels v. Lapham, 21 Vt. 222; McDaniels v. Bank of Rutland, 29 Vt. 230; Hinkle v. Minneapolis, &c., R. R., 32 Minn. 434; Berdell v. Bissell, 6 Col. 162. Though an action founded on a deed can be discharged only by a deed, yet when any damages have accrued under the deed the accord may be pleaded in discharge of those damages; Smith v. Brown, 3 Hawks 580. As a rule, the courts will not examine into the adequacy of the consideration of the agreement where the claim is uncertain or disputed. The items in such case are not to be inquired into, and in the absence of fraud such a settlement is binding and conclusive; Barlow v. Ocean Ins. Co., 4 Met. 270; Leach v. Fobes, 11 Gray 506; Riggs v. Hawley, 116 Mass. 596.

Composition with creditors. — While the principle of accord and satisfaction is as already stated, there is an important exception to it in the case of composition with creditors. Where creditors agree with their debtor that they will discharge him upon his paying or securing to them a percentage of their debt, the debtor has a right to set up this arrangement as a full discharge; otherwise, the creditor who breaks the agreement with

his debtor would perpetrate a fraud upon the others who adhere to it; Warren v. Skinner, supra. Each creditor has the undertaking of the others as a consideration for his own, and, each acting upon the faith of the engagements of the others, the case is not within the principle of Cumber v. Wane; Daniels v. Hatch, 21 N. J. Law 391. The agreement must be strictly performed by all, and free from all suspicion of fraud or collusion, or it will not bind. Thus if the composition provides for a pro ratâ payment to all the creditors, a secret agreement, by which the debtor undertakes to pay one of the creditors more than his pro ratâ share to induce him to unite in the composition, is a fraud upon the other creditors, and is void; Ramsdell v. Edgarton, 8 Met. 227; Lothrop v. King, 8 Cush. 382. And it is equally fraudulent though a friend of the debtor makes the agreement; Solinger v. Earle, 13 Jones & Sp. 80, 604; or though the debtor gives his note for the balance; Fav v. Fav. 121 Mass. 561; Lawrence v. Clark, 36 N. Y. 128. The distinction between this transaction and a promise to pay the balance of a debt discharged by bankruptcy is obvious. In the latter the discharge is past, and the conscious moral obligation is the real consideration for the promise. But in the former the consideration for the promise is that the creditor will execute a nominal and formal release which may influence others, but which is intended to be counteracted by the agreement so as to operate as no discharge of the debt; Ramsdell v. Edgarton, supra. If an agreement of creditors to release their debtor on payment of part of their several claims contains the express stipulation, "this obligation not binding unless all the creditors become parties hereto," proof that one of the creditors did not sign it and was paid his debt in full will release all from its terms, and will be no bar to an action for the balance of any creditor's claim; Turner v. Comer, 6 Gray 530; Devou v. Ham, 17 Ind. 472; even though the other creditors sign the composition deed without knowledge of such payment; Partridge v. Messer, 14 Gray 180; Kahn v. Gumbert, 9 Ind. 430. A note for the balance of a debt over and above the amount paid to a creditor under an agreement for a composition, given after the maker has been discharged thereby, but in fulfilment of an oral promise by which the creditor was induced to sign the same, is invalid in the hands of the payee; Howe v. Litchfield, 3 Allen 443. So if notes are given to a

creditor to enable him to represent himself to other creditors of the debtor as having nearly twice as large a claim against the debtor as he really has, and thus obtain a proportionably larger dividend on his debt than the other creditors, it is such a fraud as to render it wholly void even as between the parties; Sternburg v. Bowman, 103 Mass. 325. A composition deed by which the holder of a note discharges the maker upon receiving a portion of the debt does not discharge an indorser when the holder's remedy against him is expressly reserved by the deed; Tobey v. Ellis, 114 Mass. 120, and cases cited.

ARMORY v. DELAMIRIE.

HILARY, 8 G. 1. - IN MIDDLESEX, CORAM PRATT, C. J.

[REPORTED 1 STRANGE, 504.]

The finder of a jewel may maintain trover for a conversion thereof by a wrongdoer.

A master is answerable for the loss of a customer's property intrusted to his servant in the course of his business as a tradesman.

Where a person who has wrongfully converted property will not produce it, it shall be presumed, as against him, to be of the best description.

The plaintiff, being a chimney-sweeper's boy, found a jewel, and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under a pretence of weighing it, took out the stones, and, calling to the master to let him know it came to three-halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:—

- 1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover (a).
- 2. That the action will lie against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewels, several of the trade were examined to prove what a jewel of the finest water that would fit the socket should be worth; and the *Chief Justice* directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did.

This is the case usually referred to for the purpose of illustrating that leading principle of law, that bare possession constitutes a sufficient title to enable the party enjoying it to obtain legal remedy against a mere wrongdoer. It would be almost a waste of time to enumerate the modern decisions by which this proposition is enforced and explained. Two of the most remarkable are, Sutton v. Buck, 2 Taunt. 302; and Burton v. Hughes, 2 Bing. 173, where, property having been lent to the plaintiff under a written agreement, it was nevertheless held that he might maintain trover for it without producing that agreement; for though, if it had been necessary to prove the nature of his interest in it, the rules of evidence would have rendered the production of the writing indispensable, still as possession is a sufficient title against a wrongdoer, it was sufficient to show his possession without inquiring into the terms of it. The qualified right of a bankrupt or insolvent to after-acquired property also strikingly illustrates this position. Herbert v. Sayer, 5 Q. B. 965. See also Matson v. Cook, 4 Bing. N. C. 392; Elliott v. Kemp, 7 M. & W. 306 [Bridges v. Hawkesworth, 21 L. J. Q. B. 75; Harper v. Charlesworth, 4 B. & C. 574; Northam v. Bowdey, 11 Exch. 70; Every v. Smith, 26 L. J. Exch. 344; Jeffries v. Great Western Rail. Co., 5 E. & B. 802; Buckley v. Gross, 3 B. & S. 566, 32 L. J. Q. B. 129; Bourne v. Fosbrooke, 18 C. B. N. S. 515, 34 L. J. C. P. 164.

For the effect of the plea denying plaintiff's title in actions of trover and trespass under the system of pleading abolished by the Judicature Act, 36 & 37 Vict. c. 66] see Nicholls v. Bastard, 2 C. M. & R. 662; Howell v. White, 1 M. & Rob. 400; Leake v. Loveday, 4 M. & G. 980, 5 Sc. N. R. 908, S. C.; Mayhew v. Herrick, 7 C. B. 229; Jones v. Chapman, 2 Exch. 803.

It was in consequence of the doctrine thus affirmed in Armory v. Delamirie, viz. that mere possession is sufficient against a wrongdoer, that it was decided in Trevelian v. Pyne, Salk. 107, and Chambers v. Donaldson, 11 East, 65, in opposition to several old authorities, that a command, alleged in pleading, is traversable. In Trevelian v. Pyne, the action was replevin for cattle. zance, by the defendant as bailiff to J. S. Plea in bar, that defendant was not bailiff to J. S., and held good on demurrer; for though J. S. had a right to take the cattle, yet a stranger without his authority could not. Acc. Robson v. Douglas, Freem. 536; George v. Kinch, 7 Mod. 481. It was thought, indeed, long after the decision in Trevelian v. Pyne, that in trespass quare clausum fregit, if the defendant justified under the command of A., in whom he alleged the freehold to be, the plaintiff could not in his replication traverse the command, because that would admit the freehold to be in A.; and if the freehold were in A., the plaintiff ought not to maintain his action. But this distinction is now completely exploded, for in Chambers v. Donaldson, 11 East, 65, the defendants to an action of trespass quare clausum fregit pleaded that the locus in quo was

the freehold of E. B. Portman, Esq., and that they by his command broke and entered the same. The plaintiff traversed the command, and on demurrer the replication was held good upon the express ground that the defendant, if he had not the command of Portman, was a wrongdoer, and that as against a wrongdoer the plaintiff's possession, even supposing him to have no title, would be sufficient to maintain the action. See *Heath v. Milward*, 2 Bing. N. C. 98; *Carnaby v. Welby*, 8 A. & E. 878; *Brest v. Lever*, 7 M. & W. 594.

On the same principle rests the well known rule in actions of ejectment, viz. that the plaintiff must recover by the strength of his own title, not the weakness of his antagonist's; for no one can recover in ejectment, who would not be entitled to enter without bringing ejectment, and any person entering on the pos-

session of the tenant, unless he have a better title, is a wrongdoer.

[It has been suggested that the doctrine that possession is sufficient title as against a wrongdoer has no application to cases in which things lying in grant are claimed under the mere possessory title of a license; and that, consequently, a mere licensee, who, according to the rule of Wood v. Leadbitter, 3 M. & W. 840, has no title as against his licensor, cannot maintain an action against a wrongdoer for an interruption to his enjoyment under his license. See Gale on Easements, 411. The cases of Whaley v. Laing, 26 L. J. Exch. 327, 2 H. & N. 476; and Hill v. Tupper, 2 H. & C. 121, have been cited in support of this view. In the former case, the declaration alleged that the plaintiffs were possessed of mines, and of engines and boilers for working them, and had and enjoyed the benefit and advantage of the waters of a canal branch near the engines and boilers to supply them with water for working them, and that the water used and ought to run and flow without being fouled or polluted, but that the defendant wrongfully fouled and polluted the water near the place at which the supply of it for the boilers and engines was drawn, and thereby damaged the boilers and engines, and interrupted the working of the mines. The pleas were (1) not guilty, and (2) a traverse of the allegation which is printed above in italics. The Court of Exchequer gave judgment for the plaintiff. The case was taken up to the Court of Error, and there, after much diversity of opinion amongst the judges, the judgment was ultimately reversed by four judges against two, on the ground that the declaration was bad in arrest of judgment, for want of any allegation to the effect that the plaintiffs were entitled to the flow or enjoyment of the benefit of the water. See 3 H. & N. 675, 901, note (a). This case does not decide the point in question, as, in the opinion of one judge at least of the majority, it was consistent with the declaration that the plaintiff was a wrongdoer himself, there being no averment of right. See the judgment of Williams, J., in Exch. Cham. Upon this point it did not in effect decide more than that the mere fact of taking the water did not give the plaintiffs a primâ facie title. (See per Bramwell, B., Stockport Water Works v. Potter, 3 H. & C. 300.)

In Hill v. Tupper, it was held that the grant by the proprietors of a canal of an exclusive right to let boats for hire on it did not confer a right of action on the grantee against other persons using the canal for the same purpose. The ground of the decision was that it is not competent for a grantor of land to create novel and extraordinary incidents unconnected with the enjoyment of the land, and annex them to it so as to constitute a property in the grantee. (See Acroyd v. Smith, 10 C. B. 164.) But the case is very far from deciding that, assuming the right claimed to have been one capable of existence in law, the licensee of such a right would have no action against a wrongdoer for infringing it. It is submitted that wherever the right claimed is one which may by law be made the subject-matter of property, then enjoyment of such a right, though

only under a license revocable by the grantor, is as against a wrongdoer a sufficient title to enable the licensee to maintain an action upon it. See Nuttall v. Bracewell, L. R. 2 Exch. 1, 36 L. J. Ex. 1. But when the right claimed is one which the law does not recognize as capable of existence, then the grant of such a right can operate only as a license between grantor and grantee, and can confer no property as against third persons. See further, Stockport Water Works Co. v. Potter, 3 H. & C. 300.

So when the right claimed is one in itself capable of being attached by grant or prescription to property, mere possession of the property gives a primâ facie title sufficient to found an action against a wrongdoer for an infringement of the right. See Jeffries v. Williams, 5 Exch. 792, where a declaration for injury to the reversion in houses, by negligently working mines near them without leaving proper support, was held to be good, although it did not allege a right to the support, because primâ facie the defendant was a wrongdoer (acc. Bibby v. Carter, 4 H. & N. 153); and as to the nature of the right to support, see Bonomi v. Backhouse, E. B. & E. 622, 646, and Hilton v. Whitehead, 12 Q. B. 734. where a like declaration, not stating the grounds on which the plaintiff was entitled to the support, and alleging that the mines were the defendants, was held bad, because as against the adjoining proprietor the possessory right is limited to support of the land, and that of buildings is the subject of grant or prescription.

In Corby v. Hill, 4 C. B. N. S. 456, a wrongdoer was held liable to a person whose horse, while being driven along a private road, with the leave of the owners of the road, was injured by running against a dangerous obstruction, placed on the road by the wrongdoer; see further upon this question, Botch v. Smith, 7 H. & N. 736; 31 L. J. Exch. 201; and Robbins v. Jones, 15 C. B. N. S. 221, 33 L. J. C. P. 1; Gale on Easements, 411, 2 Wms. Saund. 113 (a); Stocks v. Booth, 1 T. R. 428; Griffiths v. Matthews, 5 T. R. 296; Bac. N. Abr., Action on the case, F.]

In the case of *Dobree* v. *Napier*, 2 Bing. N. C. 781, a distinction was engrafted upon the general rule that a command is traversable. This was an action of trespass for seizing a steam-vessel. The defendant pleaded a seizure of the vessel as a prize, by the command of the Queen of Portugal. The plaintiff replied facts, showing that the defendant was prohibited from entering the service of the Queen of Portugal by the provisions of the Foreign Enlistment Act. Upon demurrer, judgment was given for the defendant. "The only ground," said Tindal, C. J., "on which the authority of the servant is traversable at all in an action of trespass is to protect the person or property of a party from the officious or wanton interference of a stranger, where the principal might have been willing to waive his rights. It is obvious, that the full benefit of this principle is secured to the plaintiffs, by allowing a traverse of the authority de facto, without permitting them to impeach it by a legal objection to its validity in another and foreign country."

And on similar reasoning seems to rest the well known doctrine that a subsequent ratification of an act done in the name of the party who ratifies is tantamount to a prior command, nay, that it has relation back to the time of the act done, and is in point of law, and may be described in pleading, as a command. So that, where a person, if present at the time, could lawfully command any act to be done, any other person, though either wholly without authority, or exceeding the limits of his authority, would be justified in doing that act, provided he did it in the name or as one acting by the authority of the person entitled (whether to his advantage or not), and obtained his subsequent ratification.

Two of the earliest cases in which this doctrine was discussed appear to involve nearly all its principles. In an Anonymous Case, Hilary Term, 7 H. 4, in

the King's Bench, reported in the Year Book of 7 H. 4, Hil. 34, b., "a jury was sworn between two parties in a writ of trespass of certain cattle taken against the peace, in which the defendant had justified as bailiff for services in arrear to his lord; to which the plaintiff replied, that he was not bailiff of the lord at the time of the taking. And the plaintiff gave in evidence, that the defendant took the beasts under a claim of a heriot due to himself; so that he could not at that time have been bailiff to another. And after they were charged, Gascoigne (Lord Chief Justice) directed them, that if the defendant took the beasts under a claim of right to a heriot for himself, although the lord afterwards agreed to this taking as for services due to him, yet he could not be said to be his bailiff for that time. But if he had taken without commandment for services due to the lord, and the lord had afterwards agreed to the taking, he should be adjudged to have acted as bailiff, although he had been on no occasion his bailiff before that taking. Quod nota." So in the Anonymous Case, Michaelmas, 28, 29 Eliz., in the Common Pleas, reported Godbolt, 109. "In trespass the defendant did justify as bailiff unto another; the plaintiff replied that he took his cattle of his own wrong, without that that he was his bailiff. Anderson, C. J.: If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other, take my goods not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as bailiff or servant? Can he so father his misdemeanors upon another? He cannot; for once he was a trespasser, and his intent was manifest. But if one distrain as bailiff, although, in truth, he is not bailiff; if after he in whose right he doth it doth assent, he shall not be punished as a trespasser, for that assent shall have relation unto the time of the distress taken, and so is the book of 7 H. 4; and all that was agreed by Periam. Shuttleworth: What if he distrain generally, not showing his intent nor the cause wherefore he distrained. &c. ? ad hoc non fuit responsum. Rodes came to Anderson, and said unto him, If I having cause to distrain come to the land and distrain, and another ask the cause why I do so, if I assign a cause not true, or insufficient, yet when an action is brought against me, I may avow or justify and assign any other cause. Anderson: That is another case, but in the principal case clearly the taking is not good to which Rodes agreed."

The ratification may be by any means showing the election of the principal to treat the act as his, as by receipt of the proceeds of a sale; Hunter v. Parker, 7 M. & W. 322 [The Secretary and Co. of India v. Kamachee Boye Sahaba, 7 Moore, Indian Appeal Cases, 476]; by express approbation, Buron v. Denman, 2 Exch. 167 [Hazeler v. Lemoyne, 5 C. B. N. S. 530, 28 L. J. C. B. 103; and see Fitzmaurice v. Bayley, 6 E. & B. 868; Reuter v. Electric Telegraph Co., 6 E. & B. 346]; or, in some cases, even by tacit acquiescence, The Rolla, 6 Rob. 364 (a case resting upon peculiar grounds); Inglis v. De Barnard, 3 Moore, P. C. 425; Cameron v. Kyte, 3 Knapp 332 [Wall v. Cockerell, 29 L. J. Cha. 816]. It cannot be of an act done by a person professing, at the time, to act by his own authority, or an authority other than that of the ratifier; for instance, the execution creditor cannot by ratification become liable for the acts of the sheriff in professed execution of his duty as such; Wilson v. Tummon, 6 Scott, N. R. 894, 6 M. & Gr. 236 [Woollen v. Wright, 1 H. & C. 554, 31 L. J. Exch. 513, in Cam. Scace. And the ratifier must be capable of being designated at the time of the act done. See Watson v. Swann, 11 C. B. N. S. 756, 31 L. J. C. P. 214; see also Durrell v. Evans, 6 H. & N. 660; reversed, 1 H. & C. 174; Kelner v. Baxter, L. R. 2 C. P. 174; Melhado v. Porto Alegre Rail. Co., L. R. 9 C. P. 503, approved by the C. A. In re Empress Engineering Co., 16 Ch. D. 125, notwithstanding the observations of Malins, V.C., in Spiller v. Paris Skating Rink Co.,

7 Ch. D. 368.] In order to make it binding upon the principal, it must be with full knowledge of the nature of the act committed, or with an intention to adopt that act at all events; Freeman v. Rosher, 13 Q. B. 780; Eastern Counties Rail. Co. v. Broom, 6 Exch. 314 [Roe v. Birkenhead, &c., Rail. Co., 7 Exch. 36; Gauntlett v. King, 3 C. B. N. S. 59; Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43, 57, per Willes, J.; but see Hillberry v. Hatton, 2 H. & C. 822; 33 L. J. Exch. 190]. Where the ratification is to affect the interests of third persons, it should seem that it ought to take place whilst the principal has power to do the act himself; for instance, in the case of a notice to quit, more than half a year before the expiration of the year of tenancy; Doe v. Goldwin, 2 Q. B. 143 [see the judgment of Martin, B., in Ancona v. Marks, 7 H. & N. 686]; or in the case of stoppage in transitu before the transit is at an end, Bird v. Brown, 4 Exch. 786 [and see Jardine v. Leathley, 3 B. & S. 700, 32 L. J. Q. B. 132]. And it seems that a ratification cannot divest a right vested in possession in a third person before the ratification; see Donelly v. Popham, 1 Taunt. 1; Holland v. King, 6 C. B. 727; and quare whether it can make the previous act of a third person wrongful; see Perry v. Skinner, 2 M. & W. 471. See an instance of ratification by an executor of an act done by the direction of the testator, but after his death; Whitehead v. Taylor, 10 A. & E. 210; by an administrator of an act done before letters of administration, Foster v. Bates, 12 M. & W. 226 (see Rogers v. Dejoncourt, 1 Irish C. L. R. 482); by assignees of a bankrupt after action brought, of an act done before their appointment, Hull v. Pickersgill, 1 B. & B. 282 [by a plaintiff of the bringing an action in his name, Ancona v. Marks, 7 H. & N. 686. As to ratification by the shareholders in a company of contracts made by the directors ultra vires, see Riche v. Ashbury Rail., &c., Co., L. R. 9 Ex. 224, 7 H. L. 653, 44 L. J. Ex. 185; Evans v. Smallcombe, L. R. 3 H. L. 249; Phosphate of Lime Co. v. Green, supra; Irvine v. Union Bank of Australia, 2 App. Ca. 366, P. C.

The question, to which no response was given in the case cited from the Year Books, ante, p. 391, was recently discussed in the Court of Appeal in Matheson v. Kilburn, Trinity Sittings, 1877 (not reported). In that case a person intending to buy on behalf of another, but without authority from him, and without avowing that he was acting for any other person, bought goods in his own name; Lord Cairns, C., and Brett, L. J., were of opinion that a contract so made was incapable of ratification by the person for whom the buyer intended to buy, as the latter did not assume (see Wilson v. Tummon, 6 M. & G. 236) to buy on behalf of another person. Cockburn, C. J., was of a different opinion, holding that if the person buying really intended to act on behalf of another, the fact of his not avowing his intention could not prevent a ratification by the undisclosed principal, who, had he given prior authority, would have been liable, whether the agent disclosed the fact that he was an agent or not.

The point, however, was not decided, as the court held that the facts did not show that the buyer really did intend to buy on behalf of another.

A startling doctrine as to becoming a felon (not merely an accessory after the fact) by ratification was laid down by some of the judges in Reg. v. Woodward, 31 L. J. M. C. 91, but as there was no complete act of felony before the alleged ratification, the case is sustainable upon this ground, which Erle, C. J., and Keating, J., adopted. In Brook v. Hook, L. R. 6 Exch. 89, 40 L. J. Exch. 50, one having forged the defendant's name upon a promissory note in favor of the plaintiff, the defendant, while the note was current, in order to prevent a prosecution of the forger, but at the same time denying that the note was his or made by his authority, signed a memorandum to the effect that he held himself responsible for the note. The Court of Exchequer, dissentiente Martin, B., held

that the memorandum was not a ratification so as to make the defendant liable on the note, inasmuch as the note being a forgery was in its inception void, and therefore incapable of being ratified, and they laid it down that no authority was to be found that an act which is in itself a criminal offence is capable of ratification. See also the remarks of Burton, J., in Wilkinson v. Stoney, 1 J. & S. 509; of Crompton, J., in Ashpitel v. Bryan, 33 L. J. Q. B. 95, and the opinions in Williams v. Bayley, L. R. 1 H. L. 200.]

As to the second point in the principal case, that a master is answerable for the fraud or negligence of his servant in the course of his employment, see Coleman v. Riches, 16 C. B. 104 [Dayrell v. Tyrer, 28 L. J. Q. B. 52; Patten v. Rea, 2 C. B. N. S. 606; Holmes v. Onion, ib. 790; Seymour v. Greenwood, 6 H. & N. 359; affirmed 7 H. & N. 355; Mersey Docks and Harbor Board v. Penhallow, Cam. Scacc., 7 H. & N. 239; Bartonshill Coal Co. v. Read, 3 Macq. H. of L. Cases, 266; and as to the master's liability for the trespass of his servant, see Goff v. Great Northern Rail. Co., 30 L. J. Q. B. 148; Seymour v. Greenwood, ubi supra; and Limpus v. The London General Omnibus Co., 1 H. & C. 526. Compare Lucas v. Mason, L. R. 10 Ex. 251, 44 L. J. 145, where the defendant was held not to be liable for a trespass committed by a stranger in a mistaken attempt to enforce the defendant's orders.

The question in every case is one of implied authority. The servant is taken to have the implied authority of his master for every act done in the course of his employment, and the criterion therefore is, was the act done within the scope of the servant's employment? if so, it matters not that the master has expressly forbidden the servant to do the particular act; see Betts v. De Vitre, L. R. 3 Ch. 429, 37 L. J. Ch. 325. But where it is sought to make a master liable, on the ground of implied authority in the servant, it is a good answer to show that the master himself had not power to do the act in question, for in that case he cannot be taken to have impliedly authorized the servant to do it; Poulton v. London and North-Western Rail. Co., L. R. 2 Q. B. 534, 36 L. J. Q. B. 294. Nor is he liable for acts outside the scope of the duty which the servant was required to perform. This is the governing distinction in those cases where the liability of railway companies for acts of trespass committed by their servants, has been considered; Ibid: Edwards v. London and North-Western Rail. Co. L. R. 5 C. P. 445, 39 L. J. C. P. 241; Allen v. London and South-Western Rail. Co., L. R. 6 Q. B. 65, 40 L. J. Q. B. 55; Walker v. South-Eastern Rail. Co., L. R. 5 C. P. 640, 39 L. J. C. P. 346; Bailey v. Manchester, Sheffield, and Linc. Rail. Co., L. R. 7 C. P. 415, 8 C. P. 148, 41 L. J. C. P. 278, 42 L. J. C. P. 78; on the general question, see also Murray v. Currie, L. R. 6 C. P. 24, 40 L. J. C. P. 26; Bolingbroke v. Swindon Local Board, L. R. 9 C. P. 575; Rourke v. White Moss Colliery Co., 2 C. P. D. 205, 46 L. J. C. P. 283; Jones v. Corp. of Liverpool, 14 Q. B. D. 890, 54 L. J. Q. B. 345.

It is often a matter of some nicety to determine what acts are and what are not within the scope of the servant's employment. Thus, in *Storey* v. *Ashton*, L. R. 4 Q. B. 476, 38 L. J. Q. B. 223, the defendant, a wine merchant, sent his carman and clerk with a horse and cart to deliver wine and bring back empty bottles. They delivered the wine and received the bottles, but when they got within a quarter of a mile of defendant's premises, instead of driving home straight and depositing the empties, the earman was induced by the clerk to drive in another direction on business of the clerk's. While thus driving they ran over the plaintiff, and the court held that the defendant was not liable, as the act complained of was not done by the carman in the course of his employment. But in *Whatman* v. *Pearson*, L. R. 3 C. P. 422, 37 L. J. C. P. 156, the defendant, a contractor, employed men with horses and carts for the purpose of carry-

ing earth to and fro. The men were allowed an hour for dinner, but were not allowed to go home or to leave their horses and carts. One of the men went home about a quarter of a mile from the direct line of his work to his dinner, and left his horse unattended in the street before his door. The horse ran away and damaged the plaintiff's railings, and the court held that it was properly left to the jury to say whether the driver was acting within the scope of his employment, and that they were justified in saying that he was. Compare Mitchell v. Crassweller, 22 L. J. C. P. 100, and Sleath v. Wilson, 9 C. & P. 607, disapproved in Whatman v. Pearson, and see Page v. Defries, 7 B. & S. 137, overruling Lamb v. Lady Eliz. Palk, 9 C. & P. 629; Rayner v. Mitchell, 2 C. P. D. 357; Venables v. Smith, 2 Q. B. D. 279, 46 L. J. Q. B. 471, where a cab proprietor was held to stand (qua the public) in the relation of master towards a cabdriver (who had hired the cab on the usual terms, i. e., paying a certain sum for the day, and retaining any surplus receipts for himself), and to be responsible for the negligence of the latter while driving for a purpose of his own at the close of the day's work; but see King v. Spurr, 8 Q. B. D. 104; 51 L. J. Q. B.

As to the liability of a principal for a fraudulent representation made by his agent, see Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259; Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 145; Mackey v. Commercial Bank of New Brunswick, L. R. 5 P. C. 394; Swift v. Jewsbury, L. R. 9 Q. B. 301, 43 L. J. Ex. 56; Weir v. Barnett, 3 Ex. D. 32; Same v. Bell, id., 238; Cargill v. Bower, 10 Ch. D. 502, 47 L. J. Ch. 649; Eaglesfield v. The Marquis of Londonderry, 26 W. R. 540; Houldsworth v. City of Glasgow Bank, 5 App. Ca. 317, per Lord Blackburn.

As to the third point decided in this case, it is an illustration of that favorite maxim of the law, omnia presumunter contra spoliatorem; which signifies that if a man by his own tortious act withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted. Thus, if a man withholds an agreement under which he is chargeable, it is presumed to have been properly stamped. Crisp v. Anderson, 1 Stark. 35; [see also Attorney-General v. Dean and Canons of Windsor, 24 Beav. 679]. So, too, if goods are sold without any express stipulation as to their price, if the vendor refuse to give any express evidence of their value, they are presumed to be worth only the lowest price for which goods of that description usually sell; unless the vendee himself be shown to have suppressed the means of ascertaining the truth, for then a contrary presumption arises, and they are taken to be of the very best description. Clunnes v. Pezzey, 1 Camp. 8, et notas.

In the case of Braithwaite v. Coleman, 1 Harrison, 223, the Court of King's Bench differed on the application of this principle; it was an action by the indorsee against the drawer, and the only evidence of notice of dishonor was the following statement made by the defendant:—"I have several good defences to the action; in the first place, the letter" (containing the notice of dishonor) "was not sent to me in time." A notice to produce the letter had been given, but it was not produced: Lord Denman, C. J., thought, that as the defendant withheld the letter, the jury were justified in assuming, as they actually had done, that if produced it would have appeared to have been in time. But Littledale, Patteson, and Coleridge, J.J., thought that the letter might have been dated on the proper day, but sent by private hand, or in some way in which it would not have arrived in proper time; and that the defendant would not be bound to produce a letter which, on the face of it, might make against him, and which he might not have evidence to explain; and a rule for a new trial was made absolute. On the other hand, in Curlewis v. Corfield, 1 Q. B. 814, where a letter was shown

to have been sent to the defendant the day after dishonor, and the defendant, an attorney, afterwards objected the want of due presentment, but not that of notice, the jury on proof of a notice to produce was held warranted in inferring that the letter contained due notice of dishonor. See *Bell* v. *Frankis*, 4 M. & Gr. 446; *Lobb* v. *Stanley*, 5 Q. B. 574 [and for a further illustration of the same principle *Mason* v. *Morley*, 34 L. J. Cha. 442].

Omnia presumuntur contra spoliatorem. — This maxim has a very important application in two instances: (1) Where a party is allowed to give secondary evidence of the contents of a document or instrument which has been destroyed or withheld by his adversary; (2) where a party, having himself destroyed a document or instrument, seeks to give secondary evidence of its contents. When it appears that a party has destroyed a document, or refuses to produce it upon notice, though in his possession, and secondary evidence of the contents of such document is given, and such evidence is imperfect, vague, and uncertain, every presumption will be made against the party so destroying or refusing to produce the document; Jones v. Knauss, 31 N. J. Eq. 609; Barber v. Lyon, 22 Barb. 622; Hanson v. Eustace's Lessee, 2 How. (U.S.) 653, at p. 708; Cross v. Bell, 34 N. H. 83; Life Ins. Co. v. Mechanics Ins. Co., 7 Wend. 31; Rector v. Rector, 3 Gilm. 105; Thayer v. Middlesex Co., 10 Pick. 325. The destruction or refusal to produce a document, however, is no evidence of the fact sought to be proved by the contents of the document; Life Ins. Co. v. Mechanics' Ins. Co., supra; Hanson v. Eustace's Lessee, supra; Cross v. Bell, supra. But see Jones v. Murphy, 8 W. & S. 275, at p. 301. Unless the secondary evidence be vague and imperfect, the maxim has no application, and there is no place for presumption or inference; Bott v. Wood, 56 Miss. 136. For the general principle, see further Askew v. Odenheimer, Baldwin 380, at 390 et seq.; Winchell v. Edwards, 57 Ill. 41; Downing v. Plate, 90 Ill. 268; Thompson v. Thompson, 9 Ind. 323; Wylde v. Northern R. R. Co., 53 N. Y. 156; The Pizarro, 2 Wheat. 227; Clifton v. U. S., 4 How. (U. S.) 242.

Where a party, having himself destroyed a document, seeks to introduce secondary evidence of its contents, he must show it was destroyed under circumstances that repel all inference of a fraudulent design on his part; Blade v. Noland, 12 Wend.

173; Broadway v. Stiles, 3 Hals. 58; Riggs v. Taylor, 9 Wheat. 483, at p. 487.; Renner v. Bank of Columbia, 9 Id. 581; Joannes v. Bennett, 5 All. 169; Bagley v. McMickle, 9 Cal. 430; Tobin v. Shaw, 45 Me. 331.

Another application of the maxim is found in the rule that if a man tortiously withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted. Thus, in an action for the value of property wrongfully taken, under circumstances rendering it impossible for plaintiff to know the amount and value, where the defendant failed to show the same, it was held that all doubts in regard to the same were to be taken most strongly against the defendant; Tea v. Yates, 10 Ind. 164. So, if a party in possession of property prevent the owner from showing the quality, he may be charged for the best quality; Bailey v. Shaw, 24 N. H. 297. But if the defendant has been guilty of no fraud or improper neglect, and the only evidence against him is of delivery to him of the plaintiff's goods, of unknown quality, the presumption is that they were goods of the cheapest quality; Clunnes v. Pezzey, 1 Campb. 8; Lawton v. Sweeney, 8 Jur. 964. In Clark v. Miller, 4 Wend. 628, where drovers were sued for the price of cattle intrusted to them to be sold, it was held, the evidence as to the value of the cattle being somewhat contradictory, the jury were warranted in allowing the highest price according to the evidence, the defendants neglecting to show actual price for which the cattle sold. In Hart v. Ten Eyck, 2 Johns. Ch. 62, at p. 108, one having charge of another's property, and wilfully confounding it with his own so that it could not be distinguished, was held liable for the utmost value of the property. See also Preston v. Leighton, 6 Md. 88; Harris v. Rosenburg, 43 Conn. 227.

What right of property is sufficient to support trover? — To support this action, plaintiff must have had at the time of the conversion a complete property, either general or special, in the chattel; Odiorne v. Colley, 2 N. H. 66; Debow v. Colfax, 5 Halst. 128; Hotchkiss v. M'Vickar, 12 Johns. 403; Glaze v. M'Million, 7 Porter (Ala.) 279; Traylor v. Howall, 4 Blackf. 317. Thus, though one be in the possession of a chattel, if he have only a trust and the legal title be in another, he cannot maintain trover; Laspeyra v. M'Farland, N. C. T. R. 187; Richardson v. Means, 22 Mo. 495; Myers v. Hall, 17 Mo. Ap.

- 204; McRaeny v. Johnson, 2 Fla. 520. But see Howard v. Snelling, 28 Ga. 469. On the other hand, a trustee, though having a mere naked trust, may bring trover for the trust property; Thompson v. Ford, 7 Ired. 418. See also Guphill v. Isbell, 8 Rich. 463. In Tilden v. Brown, 14 Vt. 164, and Clowes v. Hawley, 12 Johns. 484, it was held that the equitable assignee of a debt created by a note or bond had sufficient property to maintain trover for the instrument.
- (2) A special property or interest in the plaintiff is sufficient to support the action. - Thus, bare possession, though wrongfully obtained, is sufficient title in the plaintiff to maintain trover against a mere stranger; White v. Bascom, 28 Vt. 268; Duncan v. Spear, 11 Wend. 54; Barwick v. Barwick, 11 Ired. 80; Vining v. Baker, 53 Me. 544; Harrington v. King, 121 Mass. 269; Cook v. Patterson, 35 Ala. 102. It follows, therefore, that the defendant in trover cannot show title in a stranger paramount to that of the plaintiff, though such was formerly the law in some States; see Schermerhorn v. Van Volkenburgh, 11 Johns. 529; Jones v. Sinclair, 2 N. H. 319; and is the law to-day in Michigan, Seymour v. Peters, 35 N. W. R. 62. But the defendant may show that upon demand he gave up the chattel to the true owner, or that it was taken from him by one having a paramount title; King v. Richards, 6 Whart. 418; Edson v. Weston, 7 Cow. 278. Though bare possession will support trover, one who has stolen a chattel cannot maintain trover for it; per Crompton, J., in Buckley v. Gross, 3 B. & S. 566, at 573; Merry v. Green, 7 M. & W. 623, at 632. A mere gratuitous bailee can maintain trover against a stranger for the chattel bailed; Burton v. Hughes, 2 Bingh. 173; Nicolls v. Bastard, 2 C. M. & R. 659; Vining v. Baker, 53 Me. 544; Harrington v. King, 121 Mass. 269; Faulkner v. Brown, 13 Wend. 63. In Lowremore v. Berry, 19 Ala. 130, it was held that the finder of a promissory note could maintain trover for it, though the legal title and the right to sue thereon were in another; but see M'Laughlin v. Waite, 9 Cow. 670; 5 Wend. 404. The assignees of a bankrupt may maintain trover for a promissory note covered by the assignment, though they have no legal title to the note; Chickering v. Raymond, 15 Ill. 362, and cases cited. Merely colorable possession of a chattel will not support trover against an officer taking it upon a writ against the true owner; Billings v. Thomas, 114 Mass. 570. A factor having a statutory

lien for unpaid purchase money of a chattel sold by him has sufficient property to maintain trover; Beyar v. Bush, 50 Ala. 19. But a lien founded on contract merely will not support trover; Evington v. Smith, 66 Ala. 398. Receiptor for a chattel attached by an officer can maintain trover, Thayer v. Hutchinson, 13 Vt. 504; Poole v. Symonds, 1 N. H. 289; Burrows v. Stoddard, 3 Conn. 160; Miller v. Adsit, 16 Wend. 335; Harrington v. King, 121 Mass. 269; though held otherwise formerly in New York, Dillenback v. Jerome, 7 Cow. 294; and in Massachusetts, Commw. v. Morse, 14 Mass. 217. That a finder of goods may maintain trover against a stranger, see McLaughlin v. Waite, 9 Cow. 670; Clark v. Maloney, 3 Harr. 68; that a sheriff may, Caldwell v. Eaton, 5 Mass. 399; Pettes v. Marsh, 15 Vt. 454; that a railroad conductor may for money found in his car, Tatum v. Sharpless, 6 Phila. 18; that a consignee receiving goods for transshipment merely, having made advances for prior charges, may, Fitzhugh v. Wisman, 5 Seld. (N. Y.) 559; that a part owner of a chattel, in possession and with power to sell, may, Hyde v. Noble, 13 N. H. 494; that a sheriff having appraised and inventoried goods he has levied upon may, Hargardine v. Ford, 5 Del. 380; that a sheriff may against a receiptor for goods refusing to redeliver them, Holt v. Burbank, 47 N. H. 164; Brown v. Gleed, 33 Vt. 147; that a bailee for hire may, Harker v. Dement, 9 Gill 7; Dillenback v. Jerome, 7 Cow. 297; that a consignee may, Smith v. James, 7 Id. 328; Everett v. Saltus, 15 Wend. 474; that an agister of cattle, and also a factor, may, Faulkner v. Brown, 13 Wend. 63; that a general agent under a power of attorney may, Bartels v. Arms, 3 Col. 72; that under certain circumstances bailee for hire may even against his bailor, Hickok v. Buck, 22 Vt. 149; Bowen v. Coker, 2 Rich. 13; McConnell v. Maxwell, 3 Blackf. 419; that a mere servant cannot, Dillenback v. Jerome, 7 Cow. 294; Faulkner v. Brown, 13 Wend. 63; Commo. v. Morse, 14 Mass. To maintain trover the plaintiff's possession must be coupled with an interest, or, in other words, independent of the general owner; otherwise, as in case of a servant, the action must be brought in the name of the general owner, White v. Bascom, 28 Vt. 268, at 272.

(3) The plaintiff must, at the time of the conversion, have had the actual or constructive possession, or the right to the immediate possession of the chattel, as well as the general or special

property therein to maintain trover; Fairbank v. Phelps, 22 Pick. 535; Fulton v. Fulton, 48 Barb. 581; Redman v. Gould. 7 Blackf. 361; Stevenson v. Fitzgerald, 47 Mich. 166; Skiff v. Solace, 23 Vt. 279; Clark v. Draper, 19 N. H. 419; Winship v. Neale, 10 Gray 382; Owens v. Weedman, 82 Ill. 409. The general property in a chattel creates a constructive possession, so that the owner can maintain trover for it, though not in his actual possession; Ames v. Palmer, 42 Me. 197; Kerby v. Quinn, 1 Rice (S. C.) 264; Thorp v. Burling, 11 Johns. 285; Ely v. Ehle, 3 Comst. 506; Smith v. James, 7 Cow. 328; Chesley v. St. Clair, 1 N. H. 189; Bissell v. Huntington, 2 N. H. 142; Steamboat Farmer v. McCraw, 26 Ala. 189; Story on Bailments, § 93; Nicolls v. Bastard, 2 C. M. & R. 659, though if there be a bailment the bailee also may maintain trover; Smith v. James, supra. If, however, the chattel be let for a term certain, during the continuance of the term the general owner cannot maintain trover against a stranger; otherwise if the letting be not for a term certain, and the owner may resume the chattel at any time; Drake v. Redington, 9 N. H. 243, at 248; Hart v. Hyde, 5 Vt. 328; Root v. Chandler, 10 Wend. 110; Morgan v. Ide, 8 Cush. 420; Booth v. Terrell, 16 Ga. 20; Gordon v. Harper, 7 T. R. 13. Where either the general or special owner of a chattel may maintain trover, both cannot, and a recovery by one will bar the other; White v. Bascomb, 28 Vt. 268, at 273; Steamboat Farmer v. McCraw, 26 Ala. 189; White v. Webb, 15 Conn. 305; Smith v. James, 7 Cow. 328. One having a special property in goods may maintain trover for them, though he never had possession of them, e. g. a factor who has never received goods consigned to him; Fowler v. Down, 1 B. & P. 47; so also when the plaintiff has a general property in goods; Smith v. James, supra. A merely reversionary interest in a chattel will not support trover against a stranger; Nations v. Hawkins, 11 Ala. 859; Vincent v. Cornell, 13 Pick. 294. A lessor of land for a term of years can maintain trover for trees and fixtures, after their severance from the land, though severed while in the possession of the tenant; Schermerhorn v. Buell, 4 Den. 422. One having the right of possession in land cannot maintain trover against one having the actual adverse possession for stone and gravel dug from the land; Mather v. Ministers of Trinity Church, 3 S. & R. 509. But after entry by the owner or judg-

ment in ejectment, in his favor, the possession is revested by relation from the period at which the right first accrued, and he may bring trover for the chattels severed from the land in the adverse possession of the defendant or of a third person; Morgan v. Varick, 8 Wend. 587. See also Heath v. Ross, 12 Johns. 140; Rich v. Baker, 3 Den. 79. Legal seisin carries with it the possession of everything connected with the land, unless there be adverse possession; Proprietors of Kennebec v. Call, 1 Mass. 484; Van Brunt v. Schenck, 11 Johns. 385. The mortgagee of a chattel, there being no stipulation to the contrary, has a right to the immediate possession of the chattel, and, though the chattel be in the actual possession of the mortgagor, may maintain trover against a stranger; Brackett v. Bullard, 12 Met. 308; White v. Phelps, 12 N. H. 382; Snyder v. Hitt, 2 Dana 204; or against the mortgagor himself, even before the title under the mortgage becomes absolute; Ripley v. Dolbier, 18 Me. 382. Whether the donee of a chattel not actually delivered can maintain trover, see Hunter v. Westbrook, 2 C. & P. 578. In trover by a guardian, the declaration alleging the property to be in the possession of the ward is bad on demurrer in not showing that the guardian was entitled to possession; Dearman v. Dearman, 5 Ala. 202. One discharging a lien on goods at the request of the owner can maintain trover against a stranger; Edwards v. Frank, 40 Mich. 616. A vendee of goods, without actual delivery, has a constructive possession, and may maintain trover against a stranger; Parsons v Dickinson, 11 Pick. 352. One to whom goods are to be delivered by a bill of lading can maintain trover; Powell v. Bradlee, 9 Gill & Johns. 220. A conditional sale and delivery of goods do not divest the seller of his possession, and he may maintain trover against a stranger; Phelps v. Willard, 16 Pick. 29; Whitcomb v. Hungerford, 42 Barb. 177; M'Farland v. Farmer, 42 N. H. 386. A pledgor of goods cannot maintain trover for them; Gay v. Smith, 38 N. H. 171.

Trover will not lie for a chose in action, e. g. share of stock; Sewall v. Lancaster Bank, 17 S. & R. 285; Neiler v. Kelley, 69 Penn. St. 407; Burwall v. Bushwick Co., 75 N. Y. 216; but see, contra, Budd v. Multnomah Co., 12 Ore. 271; McAllister v. Kuhn, 96 U. S. 87; Payne v. Elliott, 54 Cal. 339. But trover will lie for the paper by which the

character of the chose in action is evidenced; Pierce v. Van Dyke, 6 Hill 613; Stewart v. Martin, 49 Vt. 266. So trover will lie for a writ, but not for the judgment upon which it is founded; Keeler v. Fassett, 21 Vt. 539. Trover can be maintained for things which formed part of the realty, if they are carried away or converted to the defendant's use after severance; Whidden v. Seelye, 40 Me. 247; Moody v. Whitney, 34 Me. 563; Nelson v. Burt, 15 Mass. 204.

COLLINS v. BLANTERN.

EASTER-7 GEORGE 3. C. B.

[REPORTED 2 WILSON 341.]

Illegality may be pleaded as a defence to an action on a bond.

[The side notes to the original report which contain an abstract of the pleadings are here printed in lieu of the report itself, in which the pleadings are set out at length.]

Shropshire to wit. Debt upon bond for 700l. dated the 6th day of April, 1765 (a).

1st. Plea sets forth oyer of the obligation, wherein four others with the defendant were jointly and severally bound to the plaintiff in 700l. And also oyer of the condition for the payment of 350l. to the plaintiff on the 6th of May next.

Non est factum pleaded.

2d. The defendant pleads, that before and at the time of making the bond, and the note after mentioned, two of the obligors, John and Thomas Walker, and three others, stood indicted by John Rudge, on five indictments, for wilful and corrupt perjury, and had severally pleaded Not Guilty before the making the bond and note. And the several traverses on the indictments at the time of making the unlawful agreement after mentioned, and the note and the said bond, viz. on the same day the bond was made, were about to come on to be tried at Stafford. Whereupon it was then corruptly agreed between Rudge the prosecutor, the plaintiff, and the five persons indicted, that the plaintiff should give the prosecutor Rudge his note for 350l. in consideration for not appearing to give evi-

dence at the trial of the said traverses. And that the obligors should execute the bond to the plaintiff of the same date as the note, as an indemnity to the plaintiff for giving such note. The plaintiff gave to Rudge the prosecutor the note for 350l. for not appearing as prosecutor and giving evidence. And that the obligors on giving the note executed this bond, as an indemnity to the plaintiff for giving such note. An averment that the bond was given for the said consideration, and no other. And that the obligors were not indebted to the plaintiff, and therefore the bond is void in law; et hoc, &c.

3d. Plea that the bond was given by the obligors to indemnify the plaintiff against a note given by him to the prosecutor, and that the plaintiff has not been damnified by the note; et hoc, &c.

Replication and issue to the 1st plea. Demurrer to the 2d plea.

Demurrer to the 3d plea.

Joinders in demurrer.

COLLINS v. BLANTERN.

This case was well argued last *Hilary* term by Sergeant *Nares* for the plaintiff, and Sergeant *Glynn* for the defendant, and in this term by Sergeant *Burland* for the plaintiff, and Sergeant *Jephson* for the defendant.

On the side of the plaintiff it was insisted that the condition of the bond being singly for the payment of a sum of money, the bond is good and lawful; and that no averment shall be admitted that the bond was given upon an unlawful consideration not appearing upon the face of it, and therefore that the special plea is bad; upon the first argument these cases were cited for the plaintiff, Carth. 252; Comb. 121, Thompson v. Harvey; Lady Downing v. Chapman, (a) C. B. Mich. 6 Geo. 2 (now depending in error in B. R.), 1 Leon. 73, 203, Jenk. 106, Carth. 300, Comb. 245; Empson v. Bathurst, 1 Mod. 35, Hutton 52, Vent. 331, Cro. Jac. 248.

For the defendant it was insisted, that the averment of the wicked and unlawful consideration of giving the bond might well be pleaded, although it doth not appear upon the face of

⁽a) This case will be found reported 9 East 414, in notâ.

the deed; and that anything which shows an obligation to be void may well be averred, although it doth not appear on the face of the bond, as duress: that it was delivered as an escrow to be delivered upon a certain condition to the obligee; infancy, coverture, or upon a simoniacal contract, maintenance, &c.; and although it is said there is a difference between bonds being void at common law and by statute, yet it is otherwise, for the common law was originally by statutes which are not now in being; the general rule, that you cannot plead any matter dehors the deed, doth not apply to this case; the true meaning of that rule is, that you cannot allege anything inconsistent with and contrary to the deed, but you may allege matter consistent with the deed; the bond in the present case is for the payment of money. The plea admits this, and the averment alleges upon what consideration that money was to be paid, and therefore is not inconsistent or contradictory to the condition of the bond; this rule of pleading, applied to the cases of simony, duress, coverture, infancy, &c., is on the side of the defendant in this case. In bonds not to follow a trade, the defendant may aver the consideration to avoid the bond. Downing v. Chapman is not like this case; that was an averment contradictory to the condition of the bond, and amounted to a defeasance; the present consideration is consistent with the condition, which is for payment of money, and only shows the bad consideration upon which the money was to be paid.

Upon the first argument the Lord Chief Justice broke the case, and said that this was very different from the case of Lady Downing v. Chapman, and therefore he would consider it wholly independent thereof; and said, as he was then advised, he thought there was no difference between an act being void by statute or the common law, that the principle the judges heretofore have gone upon for making the distinctions (in the books) is not a sound one; for wherever the bond is void at law or by statute, you may show how it is void by plea, and that in truth it never had any legal existence. That the statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time; all our law began by consent of the legislature, and whether it is now law by usage or writing, it is the same thing; a statute says such a thing shall be avoided by plea, why therefore may not a deed executed upon a consideration against the common law be avoided

by plea? In duress, simony, coverture, infancy, &c., the plea discloses that in truth there never was any obligation. The principle upon which courts of justice must go is, to enforce the performance of contracts not injurious to society; and it would be absurd to say that a court of justice shall be bound to enforce contracts injurious to and against the public good. No man shall come into a court and say, "Give me a sum of money which I desire to have contrary to law;" there can be no doubt but that the compounding a prosecution for wilful and corrupt perjury is a very great offence to the public, and whether it was between some persons who are strangers to this action, it is not material.

Bathurst, Justice (upon the breaking this case), said, that the case of Lady Downing v. Chapman was not like it (a).

Gould, Justice (upon the breaking this case), said that he differed with the rest of the court in the judgment given in Lady Downing v. Chapman, and that upon the whole of that case he thought the averment that the bond there given was upon a wicked consideration, ought to have been admitted; he said that if this case at bar had been upon a simple contract, the court would not have hesitated a moment, but would have given judgment that it was bad; and shall the court sanctify a deed made upon a wicked consideration because it is sealed? To have a deed which ought to be to a man's good turned to evil purposes he thought very wrong, and that there was no distinction whether a deed be void at law or by statute.

Upon the second argument of the case at bar in this term, the Lord Chief Justice delivered the opinion of the whole court (and pronounced judgment for the defendant) to the following effect.

Lord Chief Justice Wilmot: Four questions are to be considered:

1st. Whether it doth not appear from the facts alleged in the second plea, that the consideration for giving the bond is an illegal consideration?

- 2d. Whether a bond given for an illegal consideration is not clearly void at common law ab initio?
- 3d. Supposing the bond is void, whether the facts disclosed in the plea to show it void can by law be averred and specially pleaded?

⁽a) Dr. & Stud. 12, Vent. 107. Godb. 29.

4th. If they can be pleaded; then whether this second plea is duly, aptly, and properly pleaded?

- 1. As to the first question, it hath been insisted for the plaintiff that he was not privy to the bargain and agreement, so as to him there appears to be nothing illegal done by him. But we are all clearly of opinion, that the whole of the transaction is to be considered as one entire agreement; for the bond and note are both dated upon the same day, for payment of the same sum of money on the same day; the manner of the transaction was to gild over and conceal the truth; and wherever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light. This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. Many felonies are not so enormous offences as perjury, and therefore to stifle a prosecution for perjury seems to be a greater offence than compounding some felonies. The promissory note was certainly void; what right then hath the plaintiff to recover upon this bond, which was given to idemnify him from a note that was void? They are both bad, the consideration for giving them being wicked and unlawful.
- 2. As to the second point, we are all of opinion that the bond is void ab initio, by the common law, by the civil law, moral law, and all laws whatever; and it is so held by all writers whatsoever upon this subject, except in one passage in Grotius. lib. 2. cap. 11. sect. 9. where I think he is greatly mistaken, and differs from Puffendorf, lib. 3. cap. 8. sect. 8. who, in my opinion, convicts the doctrine of Grotius. In Justin. Instit. lib. 3. tit. 20. de turpi causâ, sect. 23. Quod turpi ex causâ promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet. And Vinnius, in his commentary, carries it so far as to say, you shall not stipulate or promise to pay money to a man not to do a crime, Si quis pecuniam promiserit ne furtum aut cædem faceret, aut sub conditione, si non fecerit, adhuc dicendum stipulationem nullius esse momenti; cum hoc ipsum flagitiosum est, pecuniam pacisci quo flagitio abstineas. Dig. lib. 1. tit. 5. Code, lib. 4. tit. 7. to the same point.

This is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the

common law; and the reason why the common law says such contracts are void, is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again, you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. Procul, O! procul este profani. See Doct. & Stud. fo. 12, and chap. 24.

3. The third point is, Whether this matter can be pleaded? It is objected against the defendant that he has no remedy at law, but must go and seek it in a court of equity: I answer, we are upon a mere point of common law, which must have been a question of law long before courts of equity exercised that jurisdiction which we now see them exercise; a jurisdiction which never would have swelled to that enormous bulk we now see, if the judges of the courts of common law had been anciently as liberal as they had been in later times: to send the defendant in this case into a court of equity, is to say there never was any remedy at law against such a wicked contract as this is: we all know when the equity part of the Court of Chancery began. I should have been extremely sorry if this case had been without remedy at common law. Est boni judicis ampliare jurisdictionem: and I say, est boni judicis ampliare justitiam; therefore, whenever such cases as this come before a court of law, it is for the public good that the common law should reach them and give relief. I have always thought that formerly there was too confined a way of thinking in the judges of the common-law courts, and that courts of equity have risen by the judges not properly applying the principles of the common law, being too narrowly governed by old cases and maxims, which have too much prevented the public from having the benefit of the common law. It is now objected as a maxim, that the law will not endure a fact in pais dehors a specialty to be averred against it, and that a deed cannot be defeated by anything less than a deed, and a record by a record, and that if there be no consideration for a bond it is a gift. I answer, that the present condition is for the payment of a sum of money, but that payment to be made was grounded upon a vicious consideration, which is not inconsistent with the condition of the bond, but strikes at the contract itself in such a manner as shows, that, in truth, the bond never had any legal entity, and if it never had any being at all, then the rule or maxim that a deed must be defeated by a deed of equal strength does not apply to this case. The law will legitimate the showing it void ab initio, and this can only be done by pleading. Nothing is due under such a contract, then the law gives no action, the debitum never existed; as much as if it had been said it shall be void because there is no debt, but if this wicked contract be not pleadable, it will be good at law, be sanctified thereby, and have the same legal operation as a good and an honest contract, which seems to be most unreasonable and unrighteous, and therefore, unless I am chained down by law to reject this plea, I will admit it, and let justice take place. What strange absurdity would it be for the law to say that this contract is wicked and void, and in the same breath for the law to say, You shall not be permitted to plead the facts which clearly show it to be wicked and void! I am not for stirring a single pebble of the common law; and without altering the least tittle thereof, I think it is competent, and reaches the case before us. For my own part, I think all the cases upon acts of parliament, with respect to making bonds, &c., void, do warrant the receiving this plea and averment; there is no direction in such acts of parliament given for the form and manner of pleading in those cases; the end directs and sanctifies the means; I think there is no difference between things made void by act of parliament, and things void by the common law: statute law and common law both originally flowed from the same fountain, the legislature: I am not for giving any preference to either, but if to either, I should be for giving it to the common law. If there had ever been any idea or imagination, that such a contract as this could have stood good at common law, surely the legislature would have altered it. There has been a distinction mentioned between a bond being void by statute, and at common law, and it is said, that in the first case if it be bad, or void in any part, it is void in toto; but that at common law it may be void in part, and good in part, (a) but this proves nothing in the present case. The judges

formerly thought an act of parliament might be eluded if they did not make the whole void, if part was void. It is said, the statute is like a tyrant, where he comes he makes all void, but the common law is like a nursing father, makes only void that part where the fault is, and preserves the rest, (a) 1 Mod. 35, 36. The case of a simoniacal contract may be reached by a plea; this proves the contract in the present case is to be avoided at common law. The two cases in Leon. I set one against the other, and lay no stress upon either; infancy, coverture, duress, &c., apply directly to this case; the plea shows a fact, which, if true, the bond never had any legal existence at all: as to a bond being a gift, that is to be repelled by showing it was given upon a bad consideration; you may thereby repel the presumption of donation. It has been objected, that the admission of such plea as the present will strike at securities by deed; the answer is, that such a plea in the case of infancy, gaming, duress, &c., &c., is admissible. What is the plea of non est factum? Ninety-nine in one hundred of them are false; why then is such a plea to be received, and not the present plea? I see no reason why. I want no case to warrant my opinion, it is enough for me if there be no case against me, and I think there is not. In 1 Hen. 7, 14, 16, b., Brian was then the Chief Justice, and his opinion there is founded upon what I have now said: Brian says, (b) "I do not see in any case in the world how a man can avoid a specialty by a bare matter of fact concerning the same deed, if so be that the deed was good at the commencement;" but the present deed was never good. Moor. 564 is a simoniacal contract pleaded to a bond, which was held a bad plea, because simony was not then considered as contrary to our law, but at this day, simony being against our law, such a plea would be good. The case in Comb. 121 is nothing but an obiter dictum of a judge, to which I pay very little regard.

4. As to the fourth point, I think the plea is rightly pleaded, and concludes very properly in saying, "And so the said bond is void." It seems to me that non est factum could not have been properly said at the conclusion of this plea after the special matter before alleged; non est factum means nothing but that "I did not seal and deliver the bond," and why non est

⁽a) 1 Lev. 209; Hard. 464. (b) Cr. Eliz. 236, 697; Jenk. 108; Moor, 564.

factum may be pleaded by a feme covert I do not clearly see the reason, unless the law unites the husband and wife so closely, that it considers them as one and the same person, so that she, without the husband, cannot execute the deed. If two be jointly bound, and only one sued, he cannot plead non est factum, but ought to plead that another was bound with him. 5 Rep. 119, a. b. It is fair to tell the party what is your defence, upon what point you put your case: I think the right way is to conclude the plea as it is, And so the said writing obligatory is void, et hoc, &c., and so pray judgment if the plaintiff ought to have his action, &c., and do not see how he could say non est factum, when he sealed the deed; but supposing the plea might have been more aptly concluded, yet it is well enough upon a general demurrer, as this is, (a) and we are all of opinion that judgment may be for the defendant; that the averment pleaded is not contradictory, but explanatory of the condition; that the bond was void ab initio, and never had any existence.

Judgment for the defendant per totam curiam.

THE principle established in Collins v. Blantern, viz. that illegality may be pleaded as a defence to an action on a deed, has been so often recognized, and is so well settled as law, that it would be useless to enter upon any long discussion respecting it. "Since the case of Pole v. Harrobin, E. 22 G. 3, B. R., reported 9 East, 416, n., it has been generally understood that an obligor is not restrained from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond." Per Lord Ellenborough, L.C.J., Paxton v. Popham, 9 East, 421, 2. This, it will be remarked, carries the doctrine a step further than Collins v. Blantern, where the illegality averred in the plea was consistent with the condition. So, too, a covenant that lands on which an annuity was secured were worth more than the annuity, did not whilst the annuity act was in force estop the grantor from showing the reverse. Doed. Chandler v. Forde, 3 A. & E. 654. See further, Prole v. Wiggins, 3 Bing. N. C. 230. In Paxton v. Popham the condition of the bond on which the action was brought stated that the defendants had borrowed of the plaintiff a sum of money which was to run at respondentia interest on the security of certain goods shipped from Calcutta to Ostend, for the repayment of which on the arrival of the ship the bond was conditioned. Plea, that the bond was given to cover the price of goods sold by plaintiffs to defendants for the purpose of an illegal traffic from the East Indies, and that the plaintiffs knowingly assisted in preparing the goods for carriage upon such illegal voyage. On demurrer the court gave judgment for the defendants. Accord. Greville v. Atkins, 9 B. & C. 462.

⁽a) By St. 4 Anne, c. 16.

With respect to the different species of illegality pleadable to an action on a bond, it is impossible to do more than particularize a few of those which have actually come under discussion in reported cases. They may be divided into two classes, viz., 1. Where the illegality exists at common law; and, 2. Where it is occasioned by the enactments of some statute. Under the first class are comprehended bonds, the conditions of which militate against public policy, see Egerton v. Lord Brownlow, 4 H. of Lords Cases, 1; Hilton v. Eckersley [6 E. & B. 47; affirmed in error, ib., 66; such, for instance, as bonds in general restraint of trade: the leading case on which subject, Mitchel v. Reynolds [follows next], in this collection: for the compromise of offences, see Coppock v. Bower, 4 M. & W. 361, where an agreement to withdraw an election petition, in consideration of money, was held void. As was also in Kirwan v. Goodman, 9 Dowl. 330, a warrant of attorney given by an attorney to induce a party to forbear proceeding against him on a penal rule; see Exp. Critchley, 3 Dowl. & L. 527; Ward v. Lloyd, 6 M. & Gr. 785; 7 Scott, N. R. 499, S. C. [Williams v. Bayley, L. R. 1 H. L. 200; Exp. Caldecott, 4 Ch. D. 150; Exp. Wolverhampton, &c., Banking Co., 14 Q. B. D. 32. A threat to prosecute by the creditor will not vitiate a security subsequently given by the debtor to the creditor for the debt, and the distinction is to be noted between securities given under such circumstances by the debtor himself and those given by third parties who are under no obligation to the creditor. See Flower v. Sadler, 10 Q. B. D. 572. A contract to indemnify bail against the consequences of the non-appearance of the accused person is illegal, and money paid under it to the bail cannot be recovered back either before or after the recognizance has been forfeited; Herman v. Jeuchner, 15 Q. B. D. 561; 54 L. J. Q. B. 340, overruling on this latter point Wilson v. Strugnell, 7 Q. B. D. 548; 50 L. J. M. C. 145].

In Keir v. Leeman, 6 Q. B. 308 [affirmed in error, 9 Q. B. 371], it is laid down that a prosecution merely for an offence which might be made the subject of a civil action, for instance, a common assault, may legally be compromised; but that if the offence be in the whole or in part of a public nature, no agreement to stifle a prosecution for it can be valid; as, for instance, if the prosecution be for an assault and riot. And a promissory note given as an inducement to forbear such a prosecution, e.g. for cheating at cards, would be ordered by a court of equity to be given up; Osbaldiston v. Simpson, 13 Sim. 513. In order, however, to invalidate a contract on such grounds, the intention to interfere with the course of public justice must distinctly appear; Ward v. Lloyd, supra. [An agreement to compromise for a sum of money a suit for a divorce upon the ground of adultery of the petitioner's wife will not be specifically performed in Chancery, Gibbs v. Hume, 31 L. J. Ch. 37; and an agreement not to enforce a bond in consideration of the obligor forbearing to make public the fact of the obligee's adultery with his wife is bad, Brown v. Brine, 1 Ex. D. 5; 45 L. J. Ex. 129]. In Simpson v. Lord Howden, 10 A. & E. 793, 9 Cl. & Fin. 61, an agreement between shareholders of a proposed railway company and a peer, that he should withdraw all opposition and give his assent to the line, and that they should endeavor to alter the course of the line, and, if the bill were passed in the then session, should, in six months after it received the royal assent, pay him 5000l. as compensation for the damage which his property would sustain, was holden valid; it not being shown that the money was promised as a consideration for the peer's vote being given or withheld, or that the parties to the agreement intended to conceal it from other landholders on the line, or from the legislature, or that any fraud was committed or intended to be committed on anybody. [See the Scottish North-Eastern Rail, Co. v. Stewart, 3 Macq. H. of Lords, 382; Hare v. London and North-Western Rail. Co., 2 Johns & II. 80; 30

L. J. Ch. 817; Maunsell v. Midland, &c., Rail. Co., 1 H. & M. 130; 32 L. J. Ch. 513.]

A deed made in consideration of a future separation between husband and wife is void, Hindley v. Marquis of Westmeath, 6 B. & C. 200; Cocksedge v. Cocksedge, 14 Sim. 244; though it may be otherwise where the consideration is an immediate one, Jee v. Thurlow, 2 B. & C. 541. In Jones v. Waite, 5 Bing. N. C. 341, the Court of Exchequer Chamber agreed that a husband cannot legally sell his consent to a separation, though there was a difference of opinion on the question whether the facts stated upon that record amounted to such a sale. But where separation is inevitable, a contract settling the terms on which it is to take place is lawful, Wilson v. Muskett, 3 B. & Ad. 743; Jones v. Waite. 2 Cl. & Fin. 88 [4 M. & Gr. 1104]; Papps v. Webster, Cam. Scacc. 1848 [Randle v. Gould, 8 E. & B. 457]; and specific performance of such a contract may be decreed though there be no covenant by the trustees to indemnify the husband against the wife's debts, Frampton v. Frampton, 4 Beav. 287; Clough v. Lambert, 10 Sim. 174; Jodrell v. Jodrell, 9 Beav. 45; Wilson v. Wilson, 14 Sim. 405, where part of the consideration was to put an end to a suit for nullity of marriage on the ground of impotency of the husband; and the Vice-Chancellor, Sir Lancelot Shadwell, decreed a specific performance, and restrained the husband by injunction from compelling the wife to proceed with the suit in the Ecclesiastical Court, though it was suggested that by the practice of that court no restitution of conjugal rights could be obtained pending the suit for nullity except by a proceeding in that suit. And, upon appeal to the House of Lords, notwithstanding an attack of the most general character and conducted with consummate ability upon the policy of separation deeds, the decree of the Vice-Chancellor was affirmed, and the law, it is to be hoped, at length finally settled, 1 H. of Lords Cases, 538 [Vansittart v. Vansittart, 4 Kay & J. 62, 27 L. J. Ch. 289, per Turner, L.J.; Hunt v. Hunt, 31 L. J. Ch. 161. In Hunt v. Hunt, Lord Chancellor Westbury restrained a husband from seeking restitution of conjugal rights contrary to a covenant in a separation deed. The case was taken to the House of Lords, but Mrs. Hunt died during the proceedings, and no judgment was given; and see Brown v. Brown, L. R. 7 Eq. 185, 38 L. J. Ch. 153; Rowley v. Rowley, L. R. 1 H. L. Sc. 63. In Marshall v. Marshall, 5 P. D. 19, 48 L. J. P. 49. Sir James Hannen followed Hunt v. Hunt, and dismissed a suit brought by a wife for restitution of conjugal rights in breach of a covenant in a deed of separation. Marshall v. Marshall was approved and followed by the C. A. in Clark v. Clark, 10 P. D. 188.

Covenants in a separation deed that the husband shall part with the control over his children were void on the ground of public policy. Vansittart v. Vansittart, supra; Walrond v. Walrond, 1 Johns, 18, 28 L. J. Ch. 97; see, however, Swift v. Swift, 34 L. J. Ch. 394. It is enacted by 36 Vict. c. 12, s. 2, "that no agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the control thereof to the mother. Provided always that no court shall enforce any such agreement if the court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto." A covenant in a deed of separation licensing the wife "to live as if sole and unmarried, in such a way as she may think fit, free from all restraint," does not invalidate it, Kendall v. Webster, 1 H. & C. 440, 31 L. J. Exch. 492, and a covenant by the husband to pay an annuity to his wife without a dum casta clause is valid, nor will such a clause be implied so as to debar the wife who has subsequently committed adultery from claiming the annuity, Fearon v. Earl of Aylesford, 14 Q. B. D. 792, 54 L. J. Q. B. 33.

A covenant to marry no one but the covenantee is void, *Lowe* v. *Peers*, 4 Burr. 2225; as to conditions in a will against the marriage of testator's widow, see *Newton* v. *Newton*, 31 L. J. Ch. 690; a condition in restraint of second marriage is not void, *Allen* v. *Jackson*, 1 Ch. D. 399, 45 L. J. Ch. 310].

A bond conditioned to procure subscriptions for 9000 shares in a patent, which, by its terms, was assignable to no greater number than five persons, has been, before the statute allowing of such an assignment [(15 & 16 Vict. c. 83, s. 36)], held void for illegality, Duvergier v. Fellowes, 10 B. & C. 826, 5 Bing. 248. In Pole v. Harrobin, 9 East, 416, n., the bond was to secure money agreed to be given for the discharge of a person unlawfully impressed, and was held void. And so in Arkwright v. Cantrell, 7 A. & E. 565, was a grant conferring a judicial office on a person interested in the matters to be decided.

Bonds given on an immoral consideration, ex gr. to induce the obligee to live with the obligor in a state of fornication [are void]; Walker v. Perkins, 3 Burr. 1568, 1 Bl. 517; though it is otherwise where the bond is given in consideration of past seduction, Turner v. Vaughan, 2 Wils. 339; Nye v. Moseley, 6 B. & C. 133; even though the obligor does not cease to cohabit with the obligee, Hall v. Palmer, 3 Hare, 532. [A mortgage in consideration of a loan made to the mortgagor, whose daughter the mortgagee had seduced, for the purpose of inducing him to allow a continuation of the intercourse, was set aside in Williams v. Bullmore, 33 L. J. Ch. 461.

Contracts made for immoral purposes are simply void, and a person who makes a contract of sale or hire, knowing that the subject-matter of the contract is to be applied to an immoral purpose, cannot recover in respect of it. Pearce v. Brooks, L. R. 1 Ex. 213, 35 L. J. Ex. 134, where it was held that the plaintiff could not recover for the hire of an ornamental brougham let by him to the defendant with the knowledge that she intended to use it for the purposes of prostitution, although there was no evidence that he looked to the proceeds of her prostitution for payment; but compare Bagot v. Arnott, 2 Ir. L. R. 1.

In Cowan v. Melbourne, L. R. 2 Ex. 230, the defendant had contracted to let rooms to the plaintiff. He afterwards discovered that they were intended to be used for a purpose which the court held to be blasphemous, and refused to let the plaintiff use them, though he did not assign that as the ground of his refusal. The court held that the contract was one which could not be enforced at law.]

The illegality is equally fatal when created by statute; thus a bond will be void for contravening the provisions of 9 Anne, cap. 14, sec. 1, against gaming; see Colborne v. Stockdale, 1 Str. 493; Mazzinghi v. Stephenson, 1 Camp. 291 [a doubt was raised in Bubb v. Yelverton, L. R. 9 Eq. p. 471, whether a bond is within the provisions of 5 & 6 Wm. 4, c. 41, and 8 & 9 Vict. c. 109, s. 15, by which the statute of Anne has been altered and repealed, but the point was not decided]: those of 5 & 6 Edw. 6, c. 16, sects. 2, 3, 4 [and 49 Geo. 3, c. 126, s. 4]; against the sale of certain offices, Layng v. Paine, Willes, 571; Godolphin v. Tudor, Salk. 468; Law v. Law, 3 P. Wms. 391; Hopkins v. Prescott, C. B. 578 Græme v. Wroughton, 11 Exch. 146; Eicke v. Jones, 11 C. B. N. S. 631; Eyre v. Forbes, 12 C. B. N. S. 191]; those of the statutes of 31 Eliz. cap. 6, and 12 Anne, stat. 2, cap. 12, against simony. See the great case of Ffytche v. The Bishop of London, 1 East, 487, et notas; Fletcher v. Lord Sondes, 3 Bing. 501 [Goldham v. Edwards, 16 C. B. 437; affirmed in error, 18 C. B. 389; Sweet v. Meredith, 31 L. J. Ch. 817; 2 Giff, 610; 32 L. J. Ch. 147]. And see stat. 7 & 8 Geo. 4, c. 25, and 9 Geo. 4, c. 94; see also the whole subject elaborately discussed, Fox v. Bishop of Chester, 6 Bing. 1. So a bond not within the protection of the Act abolishing the Usury Laws, 17 & 18 Vict. c. 90, is void, if it infringe the provisions of the statutes against Usury. See the notes to Ferrall v. Shaen, 1 Wms. Saund. 294 [and Lane v. Horlock, 5 H. of Lords Cases, 580. Those provisions do not apply to cases where the principal is put in jeopardy, Howkins v. Bennett, 7 C. B. N. S. 507. An action has been held to lie on bills given after the repeal of the usury laws, in renewal of bills made before such repeal in consideration of a loan at usurious interest, Flight v. Reed, 1 H. & C. 703; 32 L. J. Exch. 265, sed quære.

The prices of butter sold in firkins not branded as required by 36 Geo. 3, c. 86, and of a building erected contrary to 18 & 19 Vict. c. 120, have been held not recoverable, Foster v. Taylor, 5 B. & Ad. 887; Stevens v. Gourley, 7 C. B. N. S. 99]. A contract to perform at an unlicensed theatre is void, Levy v. Yates, 8 A. and E. 129; and a contract may be illegal, though not in contravention of the specific directions of a statute, if it be opposed to the general policy and intent thereof, Staines v. Wainwright, 6 Bing. N. C. 174, 6 Bing. N. C. 174 [see Pooley v. Quilter, 2 De G. & J. 327; Mare v. Sandford, 1 Giff. 288; Philpot v. St. George's Hospital, 6 H. of Lords Cases, 338, 349; and Howkins v. Bennett, 7 C. B. N. S. 507. On the other hand a contract is not necessarily illegal because it is unauthorized by the governing statute, and therefore a loan on personal security though unauthorized by the Friendly Societies Act, 38 & 39 Vict. c. 60, not being illegal, may give the society a good right of proof against the estate of their debtor, Re Coltman, 19 Ch. D. 69, 51 L. J. Ch. 3. In Humphreys v. Welling, 1 H. & C. 7, a promissory note given by a debtor in consideration of a creditor withdrawing his opposition to the debtor's obtaining a final order for protection in the Insolvent Debtors' Court was held void. So in Blacklock v. Dobie, 1 C. P. D. 265, 45 L. J. C. P. 498, was an agreement that in consideration that the plaintiff would assign all his estate to the defendants, two of his creditors as trustees for the creditors, and would disclose to the defendants all his estate, they would, on realization of his estate, return to him 50l. And generally all secret agreements made with particular creditors, in order to procure their assent or buy off their opposition to a composition or arrangement with the general body of creditors are void, McKewan v. Sanderson, L. R. 20 Eq. 65, 44 L. J. Ch. 447; In re Lenzberg's Policy, 7 Ch. D. 650, 47 L. J. Ch. 178. See further as to contracts against the policy of the Bankruptcy Acts, Ex parte Baxter, 26 Ch. D. 510, 53 L. J. Ch. 802. A bond given to secure payment of a debt from which the obligor had been discharged by certificate of conformity under the Bankrupt Law Consolidation Act, 1849, is void, being a contract within the meaning of s. 204 of that act, Kidson v. Turner, 3 H. & N. 581. So is a policy on an illegal voyage, Cunard v. Hyde, 2 E. & E. 29, L. J. Q. B. 6; and see Dudgeon v. Hyde, 22 W. R. 914. Work done by solicitors in the formation of a company illegally constituted does not furnish a legal claim on which an application to wind up the company can be based, In re South Wales Atlantic Steamship Co., 2 Ch. D. 763. As to the right of an illegally constituted society to rank as a creditor, and prove a debt in a liquidation, see Ex parte Day, 1 Ch. D. 699, 45 L. J. Bey. 53; and generally as to the position of associations formed for the acquisition of gain, and consisting of more than twenty persons, but unregistered under the Companies Act, 1862, s. 4, Re Padstow, &c., Assurance Association, 20 Ch. D. 137, 51 L. J. Ch. 344; Shaw v. Benson, 11 Q. B. D. 563, 52 L. J. Q. B. 575. As to the inability of members of a trades union, inter se, to enforce its articles, Rigby v. Connol, 14 Ch. D. 482, 49 L. J. Ch. 328; Wolfe v. Matthews, 21 Ch. D. 194, 51 L. J. Ch. 833. As to deeds framed to avoid the Mortmain Acts, see Jeffries v. Alexander, Dom. Proc. 31 L. J. Ch. 9. As to maintenance and champerty, see Anderson v. Ratcliffe, E. B. & E. 806; Sprye v. Porter, 7 E. & B. 58; Knight v. Bowyer, 27 L. J. Cha. 521; Bainbridge v. Moss, 3 Jur. N. S. 58; Hutley v. Hutley, L. R. 8 Q. B. 112, 42 L. J. Q.

B. 52; Jennings v. Johnson, L. R. 8 C. P. 425; In re Attorneys' and Solicitors' Act, 1870, 1 Ch. D. 573, M. R. 44 L. J. Ch. 47; Ram Coomar Coondoo v. Chunder Canto Mookerjee, 2 App. Cas. 186, P. C.; Bradlaugh v. Newdegate, 11 Q. B. D. 1, 52 L. J. Q. B. 454.

Though where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not, yet in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was a wicked intention to break the law. Waugh v. Morris, L. R. S Q. B. 202, 42 L. J. Q. B. 57].

It is laid down in some of the older cases, that where there are several conditions to a bond, and any one of them is void by statute, the whole bond is void, Norton v. Syms, Moore, 856; S. C. Hobart, 14; Lee v. Colshill, Cr. Eliz. 599; Layng v. Paine, Willes 571 [see also Payne v. Mayor of Brecon, 3 H. & N. 572]. In Norton v. Syms, a distinction is taken in this respect between covenants or conditions void by common law, and those that are void by statute. It is said that when some covenants in an indenture are void by common law, and the others good, a bond for the performance of all the covenants may be good, so far as respects the covenants that are good. But otherwise, if any of the covenants be void by statute, there the bond is void in toto. See also 1 Mod. 35, 36; per Buller, J., 2 T. R. 139; the expressions of the Lord Chief Justice in the text; Newman v. Newman, 4 M. & S. 68; and 5 Taunt. 746.

However, the expressions used in the books, which lay down that if one of the conditions of a bond be void by statute, the whole bond is void, must be understood to apply only to cases where the statute enacts that all instruments containing any matter contrary thereto shall be void, for otherwise the common law rule will apply, and that part only will be void which contravenes the provisions of the statute, Gaskell v. King, 11 East, 165; Wigg v. Shuttleworth, 13 East, 87; How v. Synge, 15 East, 440; provided the good part be separable from, and not dependent on, the illegal part, Biddell v. Leader, 1 B. & C. 327; Kerrison v. Cole, 8 East, 232; Wood v. Benson, 2 Tyrwh. 97 [so in Payne v. Mayor of Brecon, 3 H. & N. 572, a municipal corporation was held to be liable upon its covenant to repay money borrowed on a mortgage of its land, although, by the 94th section of the Municipal Corporation Act, it is provided that it shall not be lawful for corporations of this description to mortgage any of their lands without the consent of the Lords of the Treasury, and no such consent had, in fact, been obtained].

It is indeed clear that if a contract be made on several considerations, one of which is illegal, the whole promise will be void, Featherstone v. Hutchinson, Cro. Eliz. 199; Waite v. Jones, 1 Bing. N. C. 662; Shackell v. Rosier, 2 Bing. N. C. 646; Howden v. Haigh, 11 A. &. E. 1033 [Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549]; and that whether the illegality be at common law, or introduced by statute. Per Tindal, C. J., in Shackell v. Rosier. The difference is, that every part of the contract is induced and affected by the illegal consideration; whereas in cases where the consideration is tainted by no illegality, but some of the conditions (if it be a bond) or promises (if it be a contract of any other description) are illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another. See Mallan v. May, 11 M. &. W. 653; Green v. Price, 13 M. & W. 695; Price v. Green, 16 M. & W. 346 [and Bowke v. Blake, 7 Irish C. L. Rep. 348. "For the general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether

void, but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." Per Willes, J., Pickering v. Ilfracombe Rail. Co., L. R. 3 C. P., p. 250; Robinson v. Ommanney, 23 Ch. D. 285; 52 L. J. Ch. 440. In Bubb v. Yelverton, L. R. 9 Eq., p. 471, a debtor, in order to avoid proceedings before the Jockey Club, had given a bond to two of his creditors to secure 10,000l. in respect of sums lost in bets on horse races. The debtor having died, and the question having come before the court on an administration suit, the Master of the Rolls allowed the two creditors to prove for the amount against the estate, on the ground that the true consideration for the bond was the abandonment of proceedings before the Jockey Club. The learned judge, as above stated, abstained from deciding that a bond was within the 5 & 6 Wm. 4, c. 41, which enacts that certain securities given for gaming debts are to be deemed to be given upon an illegal consideration, but, unless on the hypothesis that the bond was not within that statute, it is, perhaps, doubtful, how far this decision is compatible with the rule above stated that the illegality of one consideration avoids the whole promise, since a part of the consideration would seem necessarily to have been the debts in respect of betting losses. Of course if the 5 & 6 Wm. 4, c. 41, did not apply, the debts in respect of which the bond was given was merely a void, and not an illegal consideration, 8 & 9 Vict. c. 109, s. 18.

It may be here observed, that though the *illegality* of one of the considerations vitiates the contract, yet it is otherwise if one or more of them be merely void and nugatory, as, for instance, a promise by a man to pay his own just debts; for then the void consideration is a nullity, and the others which remain support the contract. See *Jones v. Waite*, 5 Bing. N. C. 341, and the authorities cited there by Ellis *arguendo*.

In order that a bond or other contract may be void for disobedience to a statute, it is not necessary that the statute should contain words of positive prohibition. "The principle," said Tindal, C. J., in De Begnis v. Armistead, 10 Bing, 110, "is very clearly expressed by Holt, C. J., in Bartlett v. Vinor, 'Every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute." Accord. Ferguson v. Norman, 5 Bing. N. C. 76; Cundell v. Dawson, 4 C. B. 376 [Abbott v. Rogers, 16 C. B. 277; Dallax v. Jones, 26 L. J. Exch. 79; Chambers v. Manchester and Milford Rail, Co., 5 B. & S. 588; White v. Carmarthen Rail. Co., 1 H. & M. 786; in re Cork and Youghal Rail. Co., L. R. 4 Ch. 748; Melliss v. Shirley Local Board, 16 Q. B. D. 446]; see too Gas Light Co. v. Turner, 6 Bing. N. C. 324, 5 ib. 666, where it was held that the covenants in a lease, expressed to be granted for a purpose forbidden by statute, could not be enforced (and it was there made a question, whether the landlord could ever recover the land, which, however, it should seem he might, see Tregoning v. Attenborough, 7 Bing. 97; Feret v. Hill, 15 C. B. 207; but see Scarfe v. Morgan, 4 M. & W. 270). In Cope v. Rowlands, 2 M. & W. 157 [and Taylor v. Crowland Gas, &c., Co., 10 Exch. 293], the court negatived an idea that had existed, riz. that there was a difference between the stringency of a statute for the protection of the subject and one for the protection of the rev-

Nice questions of construction, however, sometimes arise in determining whether the intention of a statute prescribing, under penalties, the mode of carrying on a particular trade, according to certain rules for the protection of the revenue, is merely to protect and increase the revenue by enforcing the pen-

alties against a trader who does not comply with the rules, or to render the contracts entered into by such trader illegal. See Johnson v. Hudson, 11 East, 180. In Smith v. Mawhood, 14 M. & W. 452, it was laid down in conformity with the cases above cited, that where the intent of a statute is to prohibit a contract, although that be only by the imposition of a penalty and for purposes of revenue, the contract is void, and cannot be enforced by action; but upon the construction of the statute then under consideration, the Excise License Act, 6 Geo. 4, c. 81, it was holden that the sections 25 and 26 which enforce penalties upon any manufacturer, or dealer in, or seller of tobacco, who shall not have his name painted on his entered premises, or shall not have obtained a license, had not the effect of avoiding a sale made by one who had not conformed to their provisions, or of defeating an action for the price.

[The imposition (by the 57 Geo. 3, c. 60, s. 3) of a penalty on persons acting as brokers in London without license, disables such person from recovering commission on contracts negotiated by them in defiance of the act, but does not affect their right to recover from their principals money paid at the request of the latter in fulfilment of the contracts. Smith v. Lindo, 4 C. B. N. S. 395, S. C. affirmed in error 4 C. B. N. S. 587. And notwithstanding the provisions of the Stamp Act, 1867, ss. 7, 9, 13 and 14, a contract of sea insurance not expressed in a stamped policy, may be a good consideration for a subsequent promise by a member of a mutual insurance association to pay contributions, and such member may by his conduct estop himself from raising the objection of invalidity, Barrow Mutual Insurance Association v. Ashburner, 54 L. J. Q. B. 377.]

A contract will not become illegal by relation which was not so when made, although the party making it was bound by law under a penalty to do a subsequent act, which has however been neglected; thus where an attorney neglected to enter his certificate he was permitted to recover for work done before the expiration of the time allowed for entering it, Eyre v. Shelley, 6 M. & W. 269.

And there may occur cases in which a contract, the performance of which could not have been enforced because the contract itself was forbidden, will become available if executed, because the policy of the statute which prohibits its enforcements while in an executory state was to secure its execution. M' Callan v. Mortimer, 9 M. & W. 640, where the seller of stock recovered the price of stock actually transferred, although at the time of the contract to transfer, the seller was not actually possessed of or entitled to the stock, and so the contract, while executory, as it is said, was incapable of being enforced by reason of the provisions of the Stock Jobbing Act, 7 Geo. 2, c. 8, s. 8 [repealed by 23 Vict. c. 28. And compare the case of Westlake v. Adams, 5 C. B. N. S. 248; 27 L.J. 271, where the plaintiff, a master, had made with the defendant an indenture of apprenticeship, void under 8 Anne, c. 9, s. 39, because only a part of the amount of the premium was stated in the instrument, and it was held nevertheless (distinguishing the case of Jackson v. Warwick, 7 T. R. 121), that the deed having been acted upon, and the boy having served his time under it, the master might recover from the defendant, the father of the boy, the whole amount of the premium agreed upon; although service under such an indenture would not create the relation of master and apprentice even as against a wrongdoer enticing the latter away from the service, Cox v. Munsey, 6 C. B. N. S. 375.

As a general rule in cases of contracts incapable of enforcement by reason of illegality while still executory, the maxim quod fieri non debuit factum ralet applies, and when executed they become available, and cannot be undone, for instance, where money has been paid in pursuance of an illegal contract which had been performed, it cannot (as a general rule) be recovered back. But if

money have been paid in such a manner that both parties are in delicto, but nevertheless there has been a compulsion exercised by the person receiving upon the person paying the money, so that, though in delicto, they are not in pari delicto, the money may be recovered back; Atkinson v. Denby, 6 H. & N. 778, 30 L. J. Exch. 361; affirmed, 7 H. & M. 934, 31 L. J. 362. A completed transfer of shares executed in pursuance of a voluntary settlement made in view of future illegal cohabitation cannot be undone at the instance of the settlor's executor, Ayerst v. Jenkins, L. R. 16 Eq. 275. And where a grantee had entered and realized the amount of his advance under a bill of sale given in consideration of the grantee's meeting a bill on which the grantor had forged his acceptance, on the bankruptcy of the grantor it was held that the transaction could not be set aside at the instance of the trustee, ex parte Caldecott, 4 Ch. D. 150; and see the notes to Marriott v. Hampton, and Merryweather v. Nican, post, vol. 2. In re Cork and Youghal Rail. Co., L. R. 4 Ch. 748, it was held that the holders of Lloyd's bonds under the seal of a railway company had a valid claim against the assets of the company, notwithstanding 7 & 8 Vict. c. 85, s. 19, which imposes a penalty on a company for issuing such securities (see Chambers v. Milford and Manchester Rail. Co., 82 L. J. Q. B. 268), the company having had the benefit of the sums of money in respect of which the instruments were given. But as long as the contract is executory it may be repudiated, and the party who has paid over money or delivered goods for an illegal purpose which has not been carried out is not precluded from recovering them back from his confederates. [Taylor v. Bowers, 1 Q. B. D. 291, 45 L. J. Q. B. 163; Symes v. Hughes, L. R. 9 Eq. 475; Bowes v. Foster, 2 H. & N. 779, 27 L. J. Ex. 262, and see Herman v. Jeuchner, 15 Q. B. D. 561.]

It seems, that a contract is not illegal or void, simply because private rights are interfered with by the act stipulated for; e. g., where the consideration is a breach of contract or of private trust, the contract may be enforced, and the persons injured by its performance are left to the ordinary means of redress; Walker v. Richardson, 10 M. & W. 284; per Parke, B., Jackson v. Cobbin, 8 M. & W. 797; per Vaughan, C. J., Rudyard's Case, 2 Vent. 23. [Where, however, money was promised to an agent partly in consideration of a promise by him to use his influence with his principal to procure the acceptance of the defendant's tender, it was held that the promise could not be enforced, Harrington v. Victoria Docks, 3 Q. B. D. 549.]

In a modern case of great importance, the question arose whether illegality vitiated the contract in which it existed only, or whether its effect was such as also to vitiate any subsequent contract to do an act just in itself and not objectionable otherwise than for being part of the terms of the original contract, though such subsequent contract were under seal, and for a good consideration, and the illegality wholly past and gone? That was the case of Fisher v. Bridges, 2 E. & B. 118, in the Queen's Bench; 3 E. & B. 642, in the Exchequer Chamber. There, to an action upon a covenant for payment of money, the defendant pleaded an agreement for a sale of land by the plaintiff to him, defendant, for a sum of money," to the intent, and in order, and for the purpose, as the plaintiff at the time of the agreement for sale well knew, that the land should be sold by lottery, contrary to the statute," that afterwards, in pursuance of this illegal agreement, the lands were assigned, and that the defendant made the deed to secure payment to the plaintiff of part of the purchase money which remained unpaid. The Court of Queen's Bench held this to be a bad plea, upon the ground that it did not show that the deed of covenant was stipulated for in, or given under, or in contemplation or furtherance of the illegal contract: and to use the language of Erle, J., "that whatever is entirely posterior to the illegal act may be supported

as not being tainted with the illegality;" and they likened this case to that of a bond to provide an allowance for a woman with whom the obligor had cohabited. The Court of Exchequer Chamber, however, were of a contrary opinion, saying, that "it is clear that the covenant was given for payment of the purchase money. It springs from and is a creature of the illegal agreement, and as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase money, which by the original bargain was tainted with illegality." The court then proceeded to deal with the cases respecting provisions in consideration of past cohabitation, as follows: - "The case of Beaumont v. Reeve [8 Q. B. 843], much relied upon in the court below, does not in our judgment affect the question. It is clear that past cohabitation and previous seduction are not good considerations for a parol promise; but they are not therefore illegal considerations. They are no considerations at all: and, inasmuch as a bond, or other instrument under seal, is good without any consideration, it by no means follows that a covenant to pay a sum of money tainted with illegality can be enforced merely because a bond for maintenance founded upon past cohabitation or previous seduction is good. If an agreement had been made to pay a sum of money in consideration of future cohabitation, and after cohabitation, the money being unpaid, a bond had been given to secure that money, that would be the same case as this; and such a bond could not under such circumstances be enforced." | See also Ayerst v. Jenkins, L. R. 16 Eq. 275, per Selborne, L. C.

The case [of Fisher v. Bridges] belongs to a class which it has been the tendency of some modern decisions to enlarge, of solemn contracts not in themselves transgressing any positive rule of law, yet held to be void by reason of some constructive illegality, or supposed tendency to contravene public policy. The expression upon which the judgment of the Court of Exchequer Chamber turns, that the contract was void because it was "to pay a sum of money tainted with illegality," is surely vague in itself and dangerous as a precedent. What may have been the true construction of the plea in Fisher v. Bridges is a matter of small importance; but it may be hoped that it is not too late, by the aid of the highest tribunal, to restore the rule of law laid down by the Court of Queen's Bench. In Hilton v. Eckersley [6 E. & B. 47; affirmed in error, ib. 66], the doctrine was again avowed by high authority, that a contract might be void as contrary to public policy, although not violating any rule of law, and the existence of such a doctrine was lamented. The law upon this subject is, it must be confessed, in an unsatisfactory state, and there seems but too much ground to fear that unless checked by a firm determination to uphold men's acts, when not in violation of some known rule of law, and to treat decided cases having a contrary tendency as exceptional, it may degenerate into the mere private discretion of the majority of the court as to a subject of all others most open to difference of opinion, and most liable to be affected by changing circumstances. | Fisher v. Bridges was acted on in Geere v. Mare, 2 H. & C. 339; 33 L. J. Exch. 50. In The A. G. v. Hollingsworth, 2 H. & N. 416; and Flight v. Reed, 1 H. & C. 703, 32 L. J. Exch. 265, the connection of the instruments with the prior illegal transaction was held not to be such as to vitiate them; and compare Payne v. Mayor of Brecon, 3 H. & N. 572.]

Reference may here be made to the case of *Hawkes v. Eastern Counties Rail*. Co. [5 H. of Lords Cases, 331], where the cases relating to what has been called the *ultra vires* doctrine respecting contracts entered into by corporations were discussed and much qualified.

[The defence resting on the *ultra rires* doctrine exists only when the corporation is prohibited by law from entering into the contract upon which the

action is brought. "Corporations," said Baron Parke, in an often quoted passage, "which are creatures of law, are, when their seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred." (And see per Blackburn, J., Riche v. Ashbury, &c., Co., L. R. 9 Ex. 264, 43 L. J. Ex. 177.) "But where a corporation is created by an act of parliament for particular purposes, with special powers, then indeed another question arises: their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by reasonable inference from its enactments, that the deed was ultra vires - that is, that the legislature meant that such a deed should not be made. The question," continued the learned judge, referring to the case then before him, "appears to me to be simply this, whether it can reasonably be made out from the statute that this covenant is ultra vires, or, in other words, forbidden to be entered into by either the plaintiffs or the defendants;" see The South Yorkshire Rail., &c., Co. v. The Great Northern Rail. Co., 9 Exch. 84, 85; and the judgments of Lord Campbell, C. J., and of Erle, J., in The Mayor of Norwich v. The Norfolk Rail. Co., 4 E. & B. 413, 447; and of the Court in The South Wales Rail. Co. v. Redmond, 10 C. B. N. S. 675. Chambers v. Milford and Manchester Rail. Co., 5 B. & S. 588, 32 L. J. 268; re Cork and Youghal Rail. Co., L. R. 4 Ch. 748. Accordingly in Bateman v. The Mayor, &c., of Ashton-under-Lyne, 3 H. & N. 323, a waterworks company was held liable (Bramwell, B., dissentiente) on their contract to pay for certain work which they required for the purpose of making an application to parliament for an extension of their powers, and the ground of this decision was that the company did not appear to be prohibited from entering into such a contract; see also Payne v. Mayor of Brecon, ubi sup., and Dorrett v. Harding, 1 C. B. N. S. 524. So independently of the deed of settlement, a power bonâ fide to compromise any dispute whatever is incident to the legal existence of the persona of a body corporate or politic or of associations which are quasi corporate: Bath's Case, Re Norwich Provident Insurance Co., 8 Ch. D. 334, per James, L. J.

A prohibition is implied, or, to speak more exactly, an incapacity to contract exists, where the contracts appear to be necessarily unconnected with the purpose of the company's incorporation (see the judgment of Erle, J., in *The Mayor of Norwich* v. *The Norfolk Rail. Co.*, supra); as where, for instance, a railway company invested with no larger statutory powers than those usually given to such companies carries on the business of coal merchants. Attorney-General v. The Great Northern Rail. Co., 1 Drew. & Sm. 154.

There is another class of cases relating to corporations established under acts of parliament, and more particularly to registered joint-stock companies, in which the contract sued upon has been such as the corporation could lawfully enter into; but the question has been, whether the fulfilment of some provision or regulation prescribed by the statute or deed of settlement constituting the corporation should be considered a condition precedent to the validity of the contract. In Frend v. Dennett, 4 C. B. N. S. 576, a statutory requirement by which local boards of health are empowered to contract so as to bind the rates of their districts, provided their contracts are under seal, was held to be a condition essential to the validity of their contracts. So in Hunt v. Wimbledon Local Board, 3 C. P. D. 206, 4 C. P. D. 48, it was held that s. 174 of the Public Health Act, 1875, is imperative and not merely directory, and consequently that a claim by an architect for plans supplied by him upon a verbal order to the value of more than £50 could not be supported. This decision was approved, and followed in Young v. Mayor, &c., of Leamington, 8 App. Cas. 517, 52 L. J. Q. B.

713. In *Ernest* v. *Nicholls*, 6 H. of Lords Cases, 401, a deed which purported to be an assignment by one joint-stock company to another of its business, the latter covenanting to indemnify the former against its existing liabilities, was held to be invalidated under s. 29 of the 7 & 8 Vict. c. 110, by the fact that one of the directors who executed it was interested in the contract. See *In re South Essex Gas*, &c., Co., 1 Johns. 480; D'Arcy v. Tamar Rail. Co., L. R. 2 Ex. 158.

The following cases, namely, The Prince of Wales, &c., Assurance Co. v. Harding, E. B. & E. 183, 27 L. J. Q. B. 297, where the deed of settlement required that the seal should not be affixed except by previous order of three directors, signed by them, Agar v. The Atheneum Life Assurance Society, 3 C. B. N. S. 725, where, by deed of settlement, a resolution at a general meeting of the company was required in order to authorize the directors to borrow money, and Nowell v. The Mayor of Worcester, 9 Exch. 457, are decisions in which the violation of provisions not known to the parties contracting with the companies were held to afford no answer to actions against the companies on their contracts, although the infringement of these regulations might amount to breaches of trust as between the shareholders and the directors of the companies. See also Bill v. The Darenth Vale Rail. Co., 1 H. & N. 305.

But persons dealing with incorporated companies are ordinarily bound to take notice of the terms both of the statutes constituting the companies and of their deeds of settlement, Balfour v. Ernest, 5 C. B. N. S. 601; In re Athenaum Society, 4 K. & J. 549; and the execution by directors on behalf of a company of an instrument which, upon the face of the deed of settlement, the directors could not have had authority to execute, will not bind the company. See In re Era Assurance Society, 2 Johns. & H. 400; 30 L. J. Ch. 137; In re The State Fire Insurance Co., 33 L. J. Ch. 123. "We may now take it for granted." said Jervis, C. J., in The Royal British Bank v. Turquand, 6 E. & B. 327, "that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement, but they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done." See also the judgment of Wood, V. C., In re Athenœum Society, 4 K. & J. 560, 561; The Prince of Wales Assurance Co. v. Harding, ubi supra; Agar v. The Athenœum Life Assurance Society, 3 C. B. N. S. 725; Phosphate Lime Co. v. Green, L. R. 7 C. P. 43, where the shareholders were held to have ratified an act of the directors which was ultra vires of the directors; see also In re Saxon Life Assurance Co., 32 L. J. Ch. 207; but the whole body of shareholders cannot ratify an act which is ultra vires of the company itself, Riche v. Ashbury, &c., Co., supra. Nor can a society be made indirectly liable upon a contract ultra vires on the ground that they have held out their secretary as having power to make it; Chapleo v. Brunswick Building Society, 6 Q. B. D. 696; 50 L. J. Q. B. 372. But the directors may make themselves personally liable by so holding him out.

The distinction in the case of companies registered under the Act of 1862, between contracts invalid because they are outside the scope of the memorandum of association, and those invalid for non-fulfilment of some condition or formality required by the articles of association, is clearly explained in the judgment of Lord Cairns, in Ashbury, &c., Co. v. Riche, L. R. 7 H. L. 653, 44 L. J. Ex. 185. Referring to the effect of sections 6, 11, 12 and 14 of the Act of 1862, his Lord-

ship says, at p. 668 of L. R., "The memorandum . . . is as it were the charter. and defines the limitation of the powers of a company to be established under the Act . . . the articles of association play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company; and so accepting it, the articles proceed to define the duties, the rights, and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise, whether that which is so done is ultra vires, not only of the directors of the company, but the company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum of association, is a violation of the articles of association, or in excess of them, the question will arise whether that is anything more than an act ultra vires the directors, but intra vires the company." And see Ex parte Liquidators of British Nation Life Assurance Ass., 8 Ch. D. 679; Attorney-Gen. v. Great Eastern Rail. Co., 5 App. Cas. 473, 49 L. J. Ch. 365.]

A question sometimes arises, whether, when a statute points out a particular mode for the performance of some act therein commanded, its enactments shall be taken to be imperative or only directory; in the former only of which cases an act done in a different mode from that pointed out by the statute would be void. In Pearce v. Morrice, 2 A. & E. 96, the following rule for distinguishing between imperative and merely directory enactments is given by Mr. Justice Taunton, "A clause is directory where the provisions contain mere matter of direction, and no more; but not so when they are followed by words of positive prohibition." See Rex v. Gravesend, 3 B. & Ad. 240; Rex v. St. Gregory, 2 A. & E. 106; Brooks v. Cock, 3 A. & E. 138; Southampton Dock Company v. Richards, 1 M. & Gr. 448; 1 Scott. N. R. S. C. 219; Thompson v. Harvey, 4 H. & N. 254; Wolverhampton New Waterworks Co. v. Hawksford, 7 C. B. N. S. 795, where an act was required to be done within a certain time; Cole v. Green, 7 Scott N. R. 682 [6 M. & Gr. 872, S. C.]. where a particular mode of signature of a contract was directed.

"It is" (said Parke, in Gwynne v. Burnell, 2 Bing. N. C. 39) "by no means any impediment to construing a clause to be directory, that if it is so construed there is no remedy for non-compliance with the direction. Thus, the statutes which direct the quarter sessions to be held at certain times in the year are construed to be directory, Rex v. Justices of Leicester, 7 B. & C. 6. And the sessions held at other times are not void. Yet it would be difficult to say that there would be any remedy against the justices for appointing them on other than the times prescribed by the statute." Thames Haven Dock Co. v. Rose, 4 M. & G. 552, 5 Scott, N. R. 524, S. C.

In Gillow v. Lillie, 1 Bing. N. C. 696, the question was discussed, whether a joint deed executed by two persons, one of whom labored under a statutory disability, would be void as against both, or only as against the one rendered incapable by statute; but the point was not decided, as the court held that, the deed being several as well as joint, the defendants' several liability was sufficient to maintain the action.

That a sealed instrument was made for an illegal consideration may always be shown to avoid it; Bruce v. Lee, 4 Johns. 410; Gray v. Hook, 4 Comst. 449; Fox v. Mensch, 3 W. & S. 444; Martin v. Amos, 13 Ired. 201; Wilhite v. Roberts, 4 Dana 172; Cameron v. McFarland, 2 Car. Rep. 415; Staples v. Gould, 9 N. Y. 520; Kennett v. Chambers, 14 How. (U.S.) 38.

"The object of all laws is to suppress vice and to promote the general welfare of the state, and no one can be assisted by law in enforcing demands founded on a breach or violation of its principles. Hence sprung the maxim at common law, 'Ex turpi contractu non oritur actio.' It is the public good which allows a contract to be impeached for the illegality of the consideration. Nor does a seal, which in itself imports a consideration, protect the contract from being investigated in a court of common law. A defendant, therefore, though he is not at liberty to show that a bond executed by him is without consideration. may, nevertheless, prove that the consideration upon which it was given is illegal, as being immoral or contrary to public policy;" Martin v. Amos, supra. To hold otherwise would be to encourage violations of the law. "When a security," say the court in Farrar v. Barton, 5 Mass. 395, "is in fact made contrary to the provisions of a statute, the party attempted to be charged on such security is not estopped from alleging any facts which show its illegality. Otherwise the statute would easily be defeated, by drawing a security with such art that it might appear legal on the face of it." It is obvious that the same reasoning applies to the case of a contract illegal because contrary to public policy.

Strictly speaking, the only contracts which can be said to be illegal by statute are those which the statute in terms declares to be so. Contracts which the courts hold to be illegal because prohibited by statute are illegal simply because to allow violations of statute law is against public policy. Being a rule of policy and hence somewhat flexible, the courts have undertaken in certain exceptional cases to enforce contracts the making of which has been prohibited; White v. Franklin Bank, 22 Pick. 181. Contracts which violate statutory provisions, however, are not the only ones which are regarded as against public policy and therefore illegal. All contracts the tendency of which is injurious to the public or against the public good, the law pronounces illegal.

For the purpose of considering what contracts are illegal, the separation of contracts illegal because of statutory enactment from those that are illegal by common law is a convenient one.

The test which is to be applied to determine whether a particular contract not affected by statute is illegal, is not whether the effect of the contract in question has been injurious to the public, but whether its tendency is bad.

"In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression, or corruption. The laws look to the general tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate; "Richardson v. Crandall, 48 N. Y. 348, 362; Holladay v. Patterson, 5 Ore. 177, 180; James v. Jellison, 94 Ind. 292; Swan v. Chorpenning, 20 Cal. 182; Gibbs v. Smith, 115 Mass. 592; Bliss v. Matteson, 52 Barb. 335; McKee v. Cheney, 52 How. P. R. 144; Kribben v. Haycraft, 26 Mo. 396; Clippinger v. Hepbaugh, 5 W. & S. 315; Spinks v. Davis, 32 Miss. 152; Gil v. Williams, 12 La. Ann. 219. But see James v. Fulcrod, 5 Tex. 512, contra.

The object of the law being to discourage illegal contracts, the principles adopted are those which are deemed best calculated to restrain the making of such contracts. The general rule is that neither of the parties to an illegal contract can invoke the aid of the court either to enforce the execution of the contract or to recover damages for the breach of it, if executory, or to disturb the condition of affairs when the contract is once executed. The court leaves the parties where it finds them; Nellis v. Clark, 20 Wend. 24; Smith v. Hubbs, 1 Fairf. 71; Ager v. Duncan, 50 Cal. 325; McCausland v. Ralston, 12 Nev. 195; Clarke v. The Omaha & S. W. R. R. Co., 5 Neb. 314; Setter v. Alvey, 15 Kans. 157; Ratcliffe v. Smith, 13 Bush 172; O'Reilly v. Cleary, 8 Mo. App. 186; Jones v. Williams, 41 Tex. 390; Pepper v. Haight, 20 Barb. 429; Schultz v. Culbertson, 46 Wisc. 313; Ainsworth v. Miller, 20 Kans. 220. In the last mentioned case the court holds the following language: "Where an illegal contract has been in part performed, a court of justice will altogether refrain from adjudicating between the parties tainted with the wrong, on the ground that ex turpi causâ non oritur actio. Generally, those who violate law in their dealings with one another are left precisely in the same condition they placed themselves. Where money is paid in pursuance of an illegal contract, the consideration of course fails, for it is impossible for the party who has paid the money to enforce the performance of the illegal contract. Still, no action will lie to recover it back again. The reason of this is, that the law will not assist a party to an illegal contract. He has lost his money, it is true, in such a case, but he has lost it by his own folly or wrong in entering into a transaction which the law forbids. The end attempted to be reached by this principle is, to restrain and discourage a violation of law by withholding a remedy founded on the illegal contract."

Thus where land has been conveyed for an illegal consideration the title of the grantee cannot be disturbed either at the instance of the grantor or his representatives; Clark v. Colbert, 67 Ala. 92; White v. Hunter, 23 N. H. 128. And it is immaterial whether the grantee be plaintiff or defendant. In Cushwa v. Cushwa, 5 Md. 44, and Broughton v. Broughton, 4 Rich. 491, the grantee was allowed to maintain ejectment against the grantor, while in King v. King, 61 Ala. 479, and Ybarra v. Lorenzana, 53 Cal. 197, the grantee defended successfully under a title acquired under an illegal contract.

Contracts that have a tendency to interfere with the punishment of criminal offences are universally held to be illegal. Where a person has suffered an injury by the commission of a crime, his personal loss is likely to appear of more importance to him than the injury to the State, and the cases are therefore very numerous in which the injured party has agreed not to prosecute the offender for a money consideration. All such contracts are void; Wells v. Thompson, 50 Ala. 83; Halthaus v. Kuntz, 17 Bradw. 434; Peed v. McKee, 42 Ia. 689; Haines v. Lewis, 54 Ia. 301; Gardner v. Maxey, 9 B. Mon. 90; Morrill v. Goodenow, 65 Me. 178; Snyder v. Willey, 33 Mich. 483; Jones v. Rice, 18 Pick. 440; Lindsay v. Smith, 78 N. C. 328; National Bank of Oxford v. Kirk, 90 Penn. St. 49; Appeal of Bredin, 92 Penn. St. 241; Pearce v. Wilson, 111 Penn. St. 14; Haynes v. Rudd, 102 N. Y. 372; Hinds v. Chamberlin, 6 N. H. 225; and there is no distinction between a misdemeanor and a felony, in this respect, in the absence of statutory provisions; Partridge v. Hood, 120 Mass. 403; Vanover v. Thompson, 4 Jones 485. Where the crime involves an injury for which a

civil action will lie, it is clear that a contract for the compromise of the civil liability will not be illegal so long as there is no agreement or understanding that the offender shall not be prosecuted criminally; Atwood v. Fisk, 101 Mass. 363; Breathwit v. Rogers, 32 Ark. 758; Puckett v. Roquemore, 55 Ga. 235; Schommer v. Farwell, 56 Ill. 542; Legg v. Leyman, 8 Blackf. 148; Cheltenham Fire-Brick Co. v. Cook, 44 Mo. 29; Deere v. Wolff, 65 Ia. 32; Hatch v. Collins, 34 Hun 314; Swope v. Jefferson Fire Ins. Co., 93 Penn. St. 251; Souhegan Nat'l Bank v. Wallace, 61 N. H. 24. For, although such agreements undoubtedly tend to render the prosecution of a criminal less likely, a person ought not for that reason to be deprived of his right to obtain redress for a civil injury. But where the promise not to prosecute is part of the consideration of the contract it cannot be enforced, even though the agreement was to pay no more than the injured party was entitled to receive. Promises of a debtor or his friends to pay a creditor in consideration of his not prosecuting his debtor for obtaining goods by false pretences are therefore void, although the creditor is getting no more than the amount of his claim; Fay v. Oatley, 6 Wisc. 42; Bowen v. Buck, 28 Vt. 308; Shaw v. Reed, 30 Me. 105. An agreement to suppress criminal prosecution even for a limited time is illegal; Merrill v. Carr, 60 N. H. 114. But to render the contract illegal the agreement not to prosecute must be clearly shown; Malli v. Willett, 57 Ia. 705; Wilkins v. Riley, 47 Miss. 306; Swope v. Jefferson Fire Ins. Co., 93 Penn. St. 251; Armstrong v. Southern Express Co., 4 Bax. 376; and where a contract will bear two constructions, one legal and the other illegal, that which will render it legal is adopted; Souhegan National Bank v. Wallace, supra; Town of Hamden v. Merwin, 54 Conn. 418. In Swope v. Jefferson Fire Ins. Co., supra, it is laid down in general terms that "the guilt of the party accused and an agreement not to prosecute are essential ingredients in the compounding of a felony." In Gorham v. Keyes, 137 Mass. 583, on the other hand, it was held that where criminal proceedings were pending, an agreement to stifle the prosecution was void whether the accused was guilty or not. The true distinction, it is believed, is pointed out in Steuben Co. Bank v. Mathewson, 5 Hill (N. Y.) 249. It was there said by Cowen, J.: "In the case before us it is not averred that a criminal prosecution had been instituted. If

the plea had shown thus much, and an agreement to stop the prosecution or in any way embarrass its course, that would have been illegal and vitiated the bond, whether the prosecution had been founded on the truth or not. The public have an interest that such prosecutions should be carried on to conviction or acquittal; and the plea need not in such case aver the fact that a crime was committed. . . Another sort of criminal composition is where no public prosecution has been instituted; but, a felony or other crime having been committed, the party knowing the fact takes a promise or obligation in consideration of forbearing to prosecute. It is of such a composition that the plea in question is intended. . . . It is not possible, however, to sustain the plea if it come short of averring the actual commission of the crime." But see Deere v. Wolff, 65 Ia. 32, contra.

Bastardy proceedings, though criminal in form, are really of a civil nature and may therefore be compromised; Harter v. Johnson, 16 Ind. 271; Parker v. Way, 15 N. H. 45; Maurer v. Mitchell, 9 W. & S. 69.

It is not only the composition of crimes which the law regards as illegal. Any contract that tends to interfere with the prosecution of offenders is void; Wight v. Rindskopf, 43 Wisc. 344; Barron v. Tucker, 53 Vt. 338.

Among contracts illegal by common law, those which tend to interfere with the free and impartial exercise of executive, legislative, or judicial functions are most important. Any contract which is intended to influence a public officer by personal considerations is entirely repugnant to the policy of the law. "The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity.

. No one has a right to put himself in a position of temp-

... No one has a right to put himself in a position of temptation to do what is regarded as pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking;" Trist v. Child, 21 Wall. 441; Tool Co. v. Norris, 2 Wall. 45; Gray v. Hook, 4 Comst.

449; Ricketts v. Harvey, 106 Ind. 564; Filson's Trustees v. Himes, 5 Penn. St. 452; McBratney v. Chandler, 22 Kans. 692; Hatzfield v. Gulden, 7 Watts 152; Frost v. Inhabitants of Belmont, 6 Allen 152; Cook v. Shipman, 24 Ill. 614; Wildey v. Collier, 7 Md. 273; Rhodes v. Neal, 64 Ga. 704; Bowman v. Coffroth, 59 Penn. St. 19; Pease v. Walsh, 39 N. Y. Super. 514. The illegality in these cases depends on the corrupting tendency, not on the question whether improper influences were contemplated or used. Contracts for "lobby" services, i.e. the use of secret influence with members of the legislature, have met with universal disapproval. In Powers v. Skinner, 34 Vt. 274, the principle is thus stated: "It has been settled by a series of decisions, uniform in their reason, spirit, and tendency, that an agreement in respect to services as a lobby agent, or for the sale by an individual of his personal influence and solicitations, to procure the passage of a public or private law by the legislature, is void, as being prejudicial to sound legislation, manifestly injurious to the interests of the State, and in express and unquestionable contravention of public policy; Clippenger v. Hepbaugh, 5 Watts & S. 315; Wood v. McCann, 6 Dana 366; Marshall v. Railroad Co., 16 How. (U.S.) 314; Harris v. Roof's Executors, 10 Barb. 489; Rose v. Truax, 21 Barb. 361; Bryan v. Reynolds, 5 Wisc. 200. The principle of these decisions has no relation to the equities between the parties, but is controlled solely by the tendency of the contract; and it matters not that nothing improper was done, or was expected to be done, under it. The law will not concede to any man, however honest he may be, the privilege of making a contract which it would not recognize when made by designing and corrupt men. A person may, without doubt, be employed to conduct an application to the legislature, as well as to conduct a suit at law, and may contract for and receive pay for his services in preparing and presenting a petition or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing and making an oral or written argument, provided all these are used, or designed to be used, either before the legislature itself or some committee thereof as a body; but he cannot, with propriety, be employed to exert his personal influence, whether it be great or little, with individual members, or to labor privately, in any form with them, out of the legislative halls in favor of or against any act or subject of legislation;" Sweeney v. McLeod, 15 Pac. R. (Ore.) 275; Cary v. Western Union Tel. Co., 47 Hun 610. A contract to endeavor to procure legislation for a contingent fee, payable on the passage of the desired act, is void by reason of its tendency to induce the agent to use improper influences; Clippinger v. Hepbaugh, 5 W. & S. 315; Gil v. Williams, 12 La. Ann. 219; Marshall v. B. & O. R. R. Co., 16 How. (U. S.) 314. See also Kribben v. Haycraft, 26 Mo. 396. But in Sedgwick v. Stanton, 4 Kern. 289, an agreement for a contingent fee was held good. A contract that contemplates an appearance by counsel before legislative committees or the legislature will be upheld; Lyon v. Mitchell, 36 N. Y. 235; Yates v. Robertson, 80 Va. 475.

Any agreement contemplating a personal benefit to a public official for an act to be done by him in his public capacity is a species of bribery, and illegal; Edwards v. Estell, 48 Cal. 194; Meguire v. Corwine, 101 U. S. 108; Weed v. Black, 2 McA. 268; McGehee v. Lindsay, 6 Ala. 16; Abbot v. Am. Hard Rubber Co., 33 Barb. 579; Collier v. Waugh, 64 Ind. 456; Bartle v. Nutt, 4 Pet. 184; Root v. Stevenson, 24 Ind. 115.

Contracts involving the sale of public offices are void; Town of Meredith v. Ladd, 2 N. H. 517; Robertson v. Robinson, 65 Ala. 610; Carleton v. Whitcher, 5 N. H. 196; Hager v. Catlin, 18 Hun 448. So also are agreements to share the fees of an office; Martin v. Wade, 37 Cal. 168; Meguire v. Corwine, 101 U. S. 108; Glover v. Taylor, 38 La. Ann. 634; Field v. Chipley, 79 Ky. 260. But in Thurston v. Fairman, 9 Hun 584, it was held that an agreement between partners to share their fees of office was not void, because the fees were to be collected by the officer, and the contract controlled only the subsequent disposition.

The theory upon which these cases go is that to decrease the emoluments of office is to diminish the inducement to give the public the best service, and anything that tends to diminish the efficiency of the service is against public policy. Therefore one who resigns a position under the government on a promise of remuneration cannot recover; Eddy v. Capron. 4 R. I. 394. "The promise," it is there said, "is void on the ground that the government is deprived of the services of an officer it had appointed, by his being seduced from an office under it by private and unworthy motives."

The economical administration of the government requires

that there shall be no interference with competition for government contracts, and therefore agreements which have in view the stifling of competition for contracts for public work are illegal; Gibbs v. Smith, 115 Mass. 592; Atcheson v. Mallon, 43 N. Y. 147; Gulick v. Bailey, 10 N. J. L. 87; Kennedy v. Murdick, 5 Harr. 458; Hannah v. Fife, 27 Mitch. 172; Ray v. Mackin, 100 Ill. 246; Hunter v. Pfeiffer, 108 Ind. 197; Weld v. Lancaster, 56 Me. 453; Swan v. Chorpenning, 20 Cal. 182.

Any agreement that has a tendency to interfere with the purity of elections is void, and consequently wagers on elections are illegal, even where betting is not forbidden by statute. "If one bet can be made on an election, many can be made. If small sums can be staked, large ones can. So that on a great and exciting popular election a large amount of money may depend on the result. All those who are acting together will have a common, and may have a large, pecuniary interest in the issue. And it is conformable to the most obvious principles of economy, and dictated by the common motive to human action, self-interest, that those who are to gain or lose a large sum of money upon the happening of an event which is contingent should make a reasonable outlay of money to influence and bring about that event. . . . An election so influenced could not be regarded as the expressed will of an intelligent constituency. . . . If it be true that wagers on elections would have any tendency to create such a pecuniary interest in their result as we have no doubt they have, we can have no hesitation in saying that all such wagers are illegal and utterly void;" Ball v. Gilbert, 12 Met. 397; Denniston v. Cook, 12 Johns. 376; Merchants S. L. & T. Co. v. Goodrich, 75 Ill. 554. The same principle applies to the nomination of a candidate at a primary; Keating v. Hyde, 23 Mo. App. 555.

War suspends all relations, not only between the belligerent nations, but every citizen is bound by his allegiance to abstain from intercourse with the public enemy. It follows that contracts made between citizens of countries at war involve a violation of their duty toward the nation, and are illegal; Griswold v. Waddington, 16 Johns. 438. And a partnership existing before the war will be dissolved with the commencement of hostilities; Booker v. Kirkpatrick, 26 Gratt. 145; Griswold v. Waddington, supra.

The public functions of the citizen are not confined to the

casting of a ballot at elections. The theory of our government renders the free and untrammelled expression of opinion of the citizen, whether in favor of or against legislation, necessary to the welfare of the community. He must be allowed to oppose legislation by all legitimate means, and a withdrawal of his opposition must not be influenced by sordid motives. An agreement, therefore, on the part of a corporation to grant privileges in consideration of the withdrawal of opposition to certain legislation is void; Pingry v. Washburn, 1 Aikens 264. See also Low v. Conn. Railroad, 45 N. H. 370. And the same principle renders it illegal to induce one not to oppose municipal improvement for a money consideration; Maguire v. Smock, 42 Ind. 1. A contract, on the other hand, which interferes with public improvements is equally against public policy; Jacobs v. Tobiason, 65 Ia. 245. In a case where the plaintiff had conveyed his property to a person who had great influence in the community, intending by his aid to prevent the extension of a street across his property, and the grantee promised to reconvey when the object of the transfer should be accomplished, the court refused to compel a reconveyance. "The courts will not aid in the enforcement of any contract which has for its object the defeat of a public enterprise, nor will the courts aid any one who involves his property in peril for a like purpose, in his effort to rescue his property;" Slocum v. Wooley, 11 Atl. Rep. (N. J.) 264.

Illegality is frequently confounded with fraud; but they are not the same, and should be carefully distinguished. Fraud is a ground for the assistance of the court in favor of the injured party; he alone can avail himself of it, and the court assists him for his sake. Illegality, however, is a defence which either party can raise and which the court allows, not from any consideration for the party raising it, but from motives of public policy. Lord Mansfield in Holman v. Johnson, Cowp. 343, said: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: ex dolo malo non oritur actio. No court will lend its aid

to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise ex turpi causâ, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." While fraud is not illegality, an agreement between two parties to commit a fraud on a third, or a contract which has a tendency to influence improperly those in whom a third party has reposed trust and confidence, is clearly illegal, and no agreement which has for its object the defrauding of one not a party to the contract, whether it be a particular individual, a class of individuals, or the public at large, will be upheld. Such an agreement will be declared illegal at the instance of either party. Instances of contracts made with a view to defraud a particular person are Glenn v. Mathews, 44 Tex. 400, and Gray v. McReynolds, 65 Ia. 461. In the latter case, the heir of a testator agreed to pay a legatee a sum of money if he would cease his efforts to secure the probate of the will and permit the opposition to it to prevail, the object of the agreement being to deprive another legatee of his legacy. The contract was held to be void. See Tyler v. Larimore, 2 West. Rep. (Mo.) 177. All contracts or conveyances made with the object of defrauding the creditors of one of the parties to the agreement are void, and where property has been thus conveyed, an agreement for are conveyance or for payment is illegal and unenforceable; Nellis v. Clark, 20 Wend. 24; Ager v. Duncan, 50 Cal. 325; McCausland v. Ralston, 12 Nev. 195; Smith v. Hubbs, 1 Fairf. 71; McQuade v. Rosecrans, 36 Ohio St. 442; Jones v. Read, 3 Dana 540; Riedle v. Mulhausen, 20 Bradw. 68; Heineman v. Newman, 55 Ga. 262; Cushwa v. Cushwa, 5 Md. 44; Stone v. Locke, 46 Me. 445; King v. King, 61 Ala. 479; Crawford's Admin. v. Lehr, 20 Kans. 509; Hills v. Sherwood, 48 Cal. 386; Etter v. Anderson, 84 Ind. 333; Dietrich v. Koch, 35 Wisc. 618. And when the title to property has passed it is good against every one but the creditors; Broughton v. Broughton, 4 Rich. 491; Crawford's Admin. v. Lehr, 20 Kans. 509; Barton v. Morris, 15 Ohio 408; George v. Williamson, 26 Mo. 190. And the grantee of land conveyed for the purpose of defrauding creditors may maintain ejectment against the grantor or

his heirs; Cushwa v. Cushwa, 5 Md. 44. The case of Den. ex Dem. Wooden v. Shotwell, 3 Zab. 465, contra, loses sight of the fact that the rule potior est conditio defendent applies to executory contracts only, where the question of illegality is involved.

In another class of cases of frequent occurrence, the fraud consists in inducing a number of persons to join in an agreement on the strength of a signature obtained by a secret consideration. Contracts for such preferences are illegal. This is the settled rule in the case of composition deeds; Russell v. Rogers, 10 Wend. 473; Tirrell v. Freeman, 139 Mass. 297; Sternburg v. Bowman, 103 Mass. 325; Crossley v. Moore, 40 N. J. L. 27; Zoebisch v. Von Minden, 47 Hun 213. But while such a contract is illegal as between the parties to it, its existence is a fraud as between a creditor and one of the parties to it. Such a creditor has all the rights which are ordinarily accorded to a party who has been induced by fraud to make a contract or execute a release. But if he himself has been a party to the commission of a similar fraud upon other creditors, he can have no relief; White v. Kuntz, 107 N. Y. 518. principle is not confined to composition deeds, but also applies to the case of a secret advantage promised to a subscriber to the stock of a corporation, on the strength of whose subscription others may be induced to subscribe. The contract for the secret preference cannot be enforced; Nickerson v. English, 142 Mass. 267; Meyer v. Blair, 19 Abb. N. C. 214.

An agreement contemplating a fraud upon the general public is clearly against public policy. Thus, an agreement to palm off upon the public goods under the label of a manufacturer, even with his consent, which are manufactured by another, is bad; Bloss v. Bloomer, 23 Barb. 604; Materne v. Horwitz, 101 N. Y. 469. Upon the same principle, a contract by a physician to allow another to personate him in treating his patients cannot be enforced; Jerome v. Bigelow, 66 Ill. 452. See also Livermore v. Bushnell, 5 Hun 285, where an agreement to advance the price of stocks by fictitious dealings, to produce a false impression concerning their value, was held to be void.

There are a number of cases in which the fraud which renders the contract illegal is not so obvious. Where a person relies upon the good faith of another in acting for him, or in

advising him, whether the person in whom he reposes confidence be acting for a consideration or gratuitously, he is entitled to have such person act uninfluenced by any considerations except the interests of the person for whom he is acting. An agreement whereby the representative or adviser is to receive remuneration from any one but the person in whose interests he is supposed to be acting, necessarily tends to warp his judgment, and is a fraud upon the rights of him for whom he is acting. Such an agreement will not receive the countenance of the court; Carey v. Prentice, 1 Root 91; El Dorado Co. v. Davison, 30 Cal. 520; Valentine v. Stewart, 15 Cal. 387; Cook v. Shipman, 24 Ill. 614; Foote v. Emerson, 10 Vt. 338; Caton v. Stewart, 76 N. C. 357; Dake v. Patterson, 5 Hun 558; Wilhelm's Appeal, 30 Penn. St. 478; Barnett v. Spencer, 4 Blackf. 206; Weed v. Black, 2 McA. 268; Spence v. Harvey, 22 Cal. 336; Elkhart Co. Lodge v. Crary, 98 Ind. 238. And an agreement to pay a servant or employé a commission by one with whom he is dealing for his master cannot be enforced; Whatley v. Hughes, 53 Miss. 268; Atlee v. Fink, 75 Mo. 100; Ritter v. Lehigh V. R. Co., 7 W. N. C. (Penn.) 122; Smith v. Townsend, 109 Mass. 500; Rice v. Wood, 113 Mass. 133: Holcomb v. Weaver, 136 Mass. 265; Munson v. Syracuse G. & C. R. Co., 29 Hun 76. But where a contract made pursuant to such an illegal agreement has been executed, the employer cannot resist payment merely because of the agreement. "While the contract is still executory, and when the principal has derived no benefit from it, the mere fact that it was made by an agent who has been seduced by a bribe from allegiance to his principal, is, of itself, a defence to an action brought to compel its performance, or to recover damages for its breach. . . . The most that the defendant can say is that the plaintiff has been guilty of fraud, and the severest punishment that ought to be inflicted upon him is that which would be visited upon a fraudulent contractor;" Brewster v. Hatch, 18 Abb. N. C. 205; cf. Chouteau v. Allen, 70 Mo. 290. A broker who has agreed to take commissions from both parties, without their knowledge, can recover from neither; Dunlop v. Richards, 2 E. D. Sm. 181; Place v. Greenman, 4 Hun 660; Everhart v. Searle, 71 Penn. St. 256. On a similar principle, it was held in Spinks v. Davis, 32 Miss. 152, that an agreement by an attorney to collect a debt against a

decedent's estate, by acting as administrator thereof, is void. "The obligations undertaken were manifestly inconsistent," said the court, in that case, "and are calculated to induce a violation of one of two high public duties; and the agreement must therefore be condemned as illegal, and against public policy. It is no answer to this view of the case to say that the defendant might properly have performed his duty generally, as well to others interested as to the plaintiff, and that it is to be presumed that the arrangement was intended to be carried out by legal means and not by those which were illegal. . . . Although the act contracted to be done may be just and beneficial, as between the parties immediately concerned in it, and though it be accomplished in good faith and without undue means, yet the contract to procure it to be done is held to be against public policy, because its natural effect is to cause the party to abuse the confidence placed in him by those upon whom the influence is to be exerted, and thereby prejudicially to affect the rights of others." Where a person supposed to be acting as a disinterested adviser has contracted for a compensation to be paid him by the person for whom he procures the award of a contract, he is committing a fraud, and cannot recover his compensation by action, for his contract is illegal; Byrd v. Hughes, 84 Ill. 174; Meguire v. Corwine, 101 U.S. 108; Bollman v. Loomis, 41 Conn. 581; Holcomb v. Weaver, 136 Mass, 265; Nash v. Kerr Murray Mfg. Co., 1 West. Rep. (Mo.) 393.

Corporations, and more particularly railroad corporations, have a quasi-public character, and the public are protected against improper influence being brought to bear upon stockholders or officers in the exercise of a discretion with which the law invests them. An agreement to pay a stockholder in a railroad corporation a sum of money to induce him to use his influence to procure the erection of a depot at a certain place is illegal. "It is obvious that if one large landholder may make a valid conditional promise to pay a large sum of money to a stockholder, . . . on condition that a work of great public improvement may be so fixed as to enhance the value of his estate, all other great landholders may make like promises on similar conditions, and great public works, which should be conducted with a view to the public interest, and to the just rights of those who make advances for the public bene-

fit, would be in danger of being overlooked, and sacrificed in a mercenary conflict of separate local, and private interests;" Fuller v. Dame, 18 Pick. 472; Guernsey v. Cook, 120 Mass. 501; Noyes v. Marsh, 123 Mass. 286; Woodruff v. Wentworth, 133 Mass. 309; Barnes v. Brown, 11 Hun 315; in re Meeker, 17 Alb. L. J. 278; Jones v. Scudder, 2 Cin. Supr. Ct. 178; Western Union Tel. Co. v. U. P. R. R. Co., 1 McCrary 581.

The officers of a corporation are regarded in somewhat the same light as public officials, and an agreement to compensate one for procuring a contract for the defendants from the directors of a railroad company, where the agency and compensation were concealed from the directors by the plaintiff, was held to be void, so that the compensation could not be recovered; Davison v. Seymour, 1 Bosw. 88. An agreement of a trustee of a corporation to resign for a pecuniary consideration is illegal; Forbes v. McDonald, 54 Cal. 98. On the question whether an agreement to locate a railroad depot at a particular place or run the road along a particular route is valid, there is a conflict of opinion. In Dix v. Shaver, 14 Hun 392, and Holladay v. Patterson, 5 Ore. 177, such contracts were held to be void on the general ground that "an agreement which is designed or which in its nature and effect tends to lead persons who are charged with the performance of trusts and duties for the benefit of others to violate or betray them is contrary to public policy." But in C. R. & St. Paul R. R. Co. v. Spafford, 41 Ia. 292, and in Louisville, New Albany & Chic. R. R. Co. v. Sumner, 106 Ind. 55, similar contracts were held to be good. Where, however, there is an agreement not to locate a depot at another place, the agreement is void; Louisville, New Albany & Chic. R. R. Co. v. Sumner, supra; Williamson v. The C. R. I. & P. R. Co., 53 Ia. 126; St. Joseph & Denver City R. R. Co. v. Ryan, 11 Kans. 602. Contracts which bind an employé to act against the interests of his employer are illegal, and this is particularly true of public officers; Lucas v. Allen, 80 Ky. 681.

The law watches with jealous care all contracts affecting the marriage relation. An agreement between the husband and wife to live separate and apart from each other is contrary to public policy, and a vicious consideration, and a contract resting on such consideration is void: Friedman v. Bierman, 43 Hun 387; Florentine v. Wilson, Hill & Den. 303; People v.

Mercein, 8 Paige 47, 68. A fortiori, an agreement to pay for not opposing a divorce is void: Kilborn v. Field, 78 Penn St. 194; Hamilton v. Hamilton, 89 Ill. 349; Speck v. Dausman, 7 Mo. App. 165; Cross v. Cross, 58 N. H. 373. And even if the consideration be not the failure to oppose a divorce, the contract will be void if such be its tendency; Hamilton v. Hamilton, supra. On the other hand, the settlement of a divorce suit, on an agreement to pay a sum of money, is good; Adams v. Adams, 91 N. Y. 381. But "a covenant by the husband for the maintenance of the wife, contained in a deed of separation between them, through the medium of trustees, where the consideration is apparent, is valid, and will be enforced in equity, if it appears that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one that had already taken place; "Walker v. Walker, 9 Wall 743; Carson v. Murray, 3 Paige 483; Nichols v. Palmer, 5 Day 47; Hutton v. Duev, 3 Barr 100; Bettle v. Wilson, 14 Ohio 257; Chapman v. Grav. 8 Ga. 341; Reed v. Beazley, 1 Blackf. 97; Wells v. Stout, 9 Cal. 480; Dillinger's Appeal, 35 Penn. St. 357; Gaines v. Poor, 3 Met. (Ky.) 503; Fox v. Davis, 113 Mass. 255; Randall v. Randall, 37 Mich. 563; McCubbin v. Patterson, 16 Md. 179; Pettit v. Pettit, 107 N. Y. 677.

Any contract calculated to encourage immorality is illegal. A promise therefore in consideration of future illicit intercourse cannot be enforced. In Cusack v. White, 2 Mills Const. Rep. 279, the judge says: "I take it to be clear law, at this day, that a contract made in consideration of future cohabitation is absolutely void (3 Burrow 1568, Walker v. Perkins). The law will not permit a woman to make her virtue an article of merchandise. Such gross indecency and immorality contaminates the very source and foundation of the contract, and renders it void from the beginning." A promise of marriage made for such a consideration is consequently void; Steinfeld v. Levy, 16 Abb. Pr. (N.S.) 26; Hanks v. Naglee, 54 Cal. 51; Baldy v. Stratton, 11 Penn. St. 316. But a bond in consideration of past cohabitation is good, if there is no understanding for future illicit intercourse, even though it be continued in fact; Brown v. Kinsey, 81 N. C. 245; Gay v. Parpart, 106 U.S. 679; Bunn v. Winthrop, 1 Johns. Ch. 329.

Any agreement or combination the object and effect of which

is to stifle competition at a public sale is illegal; and no party to the agreement or combination can insist on deriving any benefit therefrom. "A sale at auction is a sale to the best bidder; its object, a fair price; its means, competition. Any agreement, therefore, to stifle competition is a fraud upon the principles on which the sale is founded. It not only vitiates the contract between the parties, so that they can claim nothing from each other, but also any purchase made under it, their claims against the vendor being weaker than those against each other.". . . "If this be the rule with regard to auctions instituted by private individuals, à fortiori should it be as to those public auctions instituted by law for great public purposes, such as execution sales, where the object is to secure the creditor, if possible, the satisfaction of his debt, and at the same time to secure for the debtor a fair price for his property;" Smith v. Greenlee, 2 Dev. L. 128; Brisbane v. Adams, 3 N. Y. 129; Corrothers v. Harris, 23 W. Va. 177; Gardiner v. Morse, 25 Me. 140; Durfee v. Moran, 57 Mo. 374; Ingram v. Ingram, 4 Jones (N. C.) L. 188; Brackett v. Wyman, 48 N. Y. 667.

No recovery can be had, therefore, for the breach of a promise not to bid at a public sale; Packard v. Bird, 40 Cal. 378. And an agreement to discharge a debt in consideration that the debtor will refrain from bidding is no defence to a suit on the claim; Gardiner v. Morse, 25 Me. 140. An agreement between two that only one shall bid at a tax sale, and the profits shared, cannot be sued on; Dudley v. Little, 2 Ham. (Ohio) 504; cf. Easton v. Mawkinney, 37 Ia. 601; and a sale procured in this way can be set aside on the ground of the fraud: Abbey v. Dewey, 25 Penn. St. 413; Hamilton v. Hamilton, 2 Rich. Eq. 355; Durfee v. Moran, 57 Mo. 374; Grant v. Lloyd, 12 Sm. & M. (Miss.) 191; Jackson v. Ludeling, 21 Wall. 616; Easton v. Mawkinney, 37 Ia. 601; Fleming v. Hutchinson, 36 Ia, 519; Underwood v. McVeigh, 23 Gratt. 409. If the officer making a sale under a judicial decree is interested in the purchase, the sale will be void; Teel v. Yancey, 23 Gratt. 691. There seems to be some doubt, however, whether an agreement not to bid at a public sale of land of the United States is not valid; Piatt v. Oliver, 1 McLean C. C. 295. But a partnership to purchase on joint account may yet be good even if it involves an agreement not to bid against each other; Phippen v. Stickney, 3 Met. 384; Kearney v. Taylor,

15 How. (U.S.) 494; James v. Fulcrod, 5 Tex. 512; Smith v. Ullman, 58 Md. 183; Hunt v. Elliott, 80 Ind. 245; McMinn v. Phipps, 3 Sneed 196; Missisquoi Bank v. Sabin, 48 Vt. 239. The court in Phippen v. Stickney, supra, says that where a combination is made "for the purpose and with the view of preventing fair competition, and by reason of want of bidders to depress the price of the article offered for sale below the fair market value, it will be illegal." "But, on the other hand, if the arrangement is entered into for no such fraudulent purpose, but for the mutual convenience of the parties, as with the view of enabling them to become purchasers, each being desirous of purchasing a part of the property offered for sale, and not an entire lot, or induced by any other reasonable and honest purpose, such agreement will be valid and binding;" and the fact that the parties to an agreement by which one is to bid for all had an interest in the property prior to the sale will frequently induce the court to uphold the agreement; Marie v. Garrison, 83 N. Y. 14; Smull v. Jones, 6 W. & S. 122. A contract to forbear purchasing at private sale is not void as against public policy; Morrison v. Darling, 47 Vt. 67.

Other instances of contracts that have been held to be illegal without the aid of a statute are the following: contracts affecting the administration of estates: an agreement to procure the appointment of a responsible person as administrator is void, as being in the nature of a sale of a private office; Porter v. Jones, 52 Mo. 399; an agreement whereby one agrees to furnish sureties so that the other party can be appointed administrator is illegal; Aycock v. Braun, 66 Tex. 201; an agreement made before the testator's death by one named as executor in his will to renounce for a consideration is void; Staunton v. Parker, 19 Hun 55; so also in the case of an intestate; Bowers v. Bowers, 26 Penn. St. 74; for such agreements interfere with proper administration; but a contract to accept letters of administration is good; Clark v. Constantine, 3 Bush 652.

Contracts made with a view to defraud the government cannot be enforced. Where one collects money under such a contract he cannot be compelled to make a division; Boyd v. Barelay, 1 Ala. 34; the vendor cannot recover the purchase price of goods sold with an agreement that false invoices shall be rendered to defraud the government out of import duties; Honegger v. Wettstein, 94 N. Y. 252; so of agreements or

transfers of property made to escape taxation; Cambioso's Executors v. Maffet's Assignees, 2 Wash. C. C. 98; Maybin v. Coulon, 4 Dall. 298; Drexler v. Tyrrell, 15 Nev. 114. Where a conveyance was made to qualify a candidate for a public office, with an agreement for a reconveyance after the election, the court will not compel a reconveyance; Roberts v. Gibson, 6 H. & J. (Md.) 116. An agreement to influence another to overthrow a charge made in the land office of fraud in an application for a patent is bad; Hoyt v. Macon, 2 Col. 502; so is a contract to procure a franchise to run a ferry in the name of the defendant and then to transfer an interest to the plaintiff; Powell v. Maguire, 43 Cal. 11. Where an action was brought to recover for services in procuring a government contract for defendants which plaintiff pretended to be making for himself, but in which he had no personal interest, the defendants acting as his sureties, the plaintiff was not allowed to recover: Ashburner v. Parrish, 81 Penn. St. 52.

In Rice v. Williams, 32 Fed. R. 437, a contract by an advertising solicitor to sell a "specialist" letters written by persons afflicted with diseases to another person who advertised articles and instruments that it was claimed would cure them, in order that such specialist might send his advertisements to them, was held to be contrary to good morals and void. Contracts tending to oppression, extortion, or the deprivation of personal rights are illegal. An agreement to pay a public officer for services which in certain contingencies he was bound to perform without compensation is void as being extortionate; Satterlee v. Jones, 3 Duer 102. An insurance company that had filed an agreement not to remove suits against them to the United States Courts under a law compelling them to do so as a condition of carrying on business within the State was held not to be bound by the agreement; Home Ins. Co. of N. Y. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S. 186. A contract that the lessee of a mine shall exercise his influence over his employés to induce them to purchase only at the store of the lessor, and binding the lessee not to accept any order given upon him by an employé for goods purchased elsewhere, is unlawful; Crawford v. Wick, 18 Ohio St. 190. But cf. George v. East Tennessee Coal Co., 15 Lea 455. It is against public policy for a railroad company to stipulate with its employés against liability for injury due to criminal negligence: Cook v.

Western & Atl. R. R. Co., 72 Ga. 48, or to the negligence of their superiors; Lake Shore & Mich. S. R. Co. v. Spangler, 44 Ohio St. 471; Western & Atl. R. R. Co. v. Bishop, 50 Ga. 465, contra; but a railroad company may absolve itself from liability for injury to live stock due to causes other than those connected with the running of the trains; Georgia R. R. Co. v. Beatie, 66 Ga. 438. A regulation of a telegraph company relieving it from liability for gross negligence or fraud of its employés or agents is void; Candee v. Western Union Tel. Co., 34 Wisc. 471.

A contract within the prohibition of an act is illegal. This question was directly passed on in Barton v. Plank Road Co., 17 Barb. 397. "The contract* was expressly within the prohibition of the statute, and the question is whether it is not therefore void. The section is only prohibitory in its terms. It does not declare in so many words that all such contracts shall be void. But this is not necessary. Every act done against a prohibitory statute is not only illegal but absolutely void, and the court cannot assist an illegal transaction, in any respect, or permit it to be set up as a protection." To the same effect are Bank of the United States v. Owens, 2 Pet. 527; Pettit v. Pettit, 32 Ala. 288. And a penalty implies a prohibition, so that a contract which contemplates an act for which a penalty is imposed is illegal; Roby v. West, 4 N. H. 285; Mitchell v. Smith, 1 Binn. 110; Elkins v. Parkhurst, 17 Vt. 105; Coburn v. Odell, 10 Fost. 540; Stanley v. Nelson, 28 Ala. 514; Funk v. Gallivan, 49 Conn. 124; Uhlig v. Garrison, 2 Dak. 71; Dillon v. Allen, 46 Ia. 299; Durgin v. Dyer, 68 Me. 143; Martin v. Hodge, 47 Ark. 378; Campbell v. Segars, 81 Ala. 259. Contracts that violate the spirit of a law are illegal, equally with those that are prohibited; Macintosh v. Renton, 2 Wash. Ter. 121; Perkins v. Savage, 15 Wend. 412. In the latter case, by the act incorporating a railroad company, it was made the duty of commissioners named in the act, in case of over-subscription for the stock, to apportion the stock among the subscribers in such manner as should be deemed most advantageous to the interests of the corporation. The plaintiff, expecting that the stock would be over-subscribed for, and that small subscriptions would be treated more favorably by the commissioners than large ones, placed money in the hands of the defendant, with directions to subscribe for the stock in small lots, in the names of others, so as to get an advantage thereby on the apportionment. The agreement was held to be invalid as against the spirit and policy of the law. Contracts against the policy of the insolvent laws are uniformly held to be illegal, and an agreement, therefore, to pay a creditor for withdrawing opposition to the debtor's discharge is void. "It is at all times intended by the legislature to effect an equal distribution of the insolvent's estate, and secure equal advantages to the creditors; and, although the giving of this note, and the payment of it afterwards by the insolvent, would not, as to that amount, lessen their distributive shares in his estate, yet the suppression of facts producing such a result, which might be the case, is alone * sufficient to prevent the recovery," * on a note given in consideration that the plaintiff would not oppose the insolvent's discharge; Wiggin v. Bush, 12 Johns. 306; Bruce v. Lee, 4 Johns. 410; Dexter v. Snow, 12 Cush. 594. And contracts giving a preference are likewise void as against the policy of the bankrupt laws; Story v. Cuba State Bank, 18 W. D. (N. Y.) 269; Case v. Gerrish, 15 Pick. 49. Where a statute provides that a license must be obtained before carrying on a particular business, any contract contemplating the carrying on of such business without a license, and any contract made in connection with such business, is void; Bach v. Smith, 2 Wash. T. 145; Buck v. Albee, 27 Vt. 190; Milton v. Haden, 32 Ala. 30; Sanderson v. Goodrich, 46 Barb. 616; Ladd v. Dillingham, 34 Me. 316; but see Prince v. Eighth St. Baptist Church, 2 West. R. (Mo.) 621, contra.

While it is the general rule that contracts which are forbidden are illegal, this is only on the ground that public policy will be best subserved, and contracts made in violation of the prohibition most discouraged, by declaring such contracts absolutely void. But "if the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract void in order to accomplish the purpose of the statute, the inference is that it was intended to be directory and not prohibitory of the contract;" Bowditch v. N. E. Mut. Life Ins. Co., 2 New Eng. Rep. (Mass.) 238; White v. Franklin Bank, 22 Pick. 181.

In connection with this subject it is well to note that when a statute declares a contract void the question of illegality does not arise in the cases of contracts directly within the act. A contract is void by force of the act, in such a case, whether

the contract prohibited be illegal or not. It follows that where a note is given in violation of such a statute, even a bonâ fide holder cannot recover, Bayley v. Taber, 5 Mass. 286; Vallett v. Parker, 6 Wend. 615; New v. Walker, 6 West. Rep. (Ind.) 869; but where a negotiable instrument is given for an illegal consideration, which is not by statute declared to be void, a bona fide purchaser for value can recover; Saltmarsh v. Tuthill, 13 Ala. 390; Trieber v. Comm. Bank, 31 Ark. 128; Cazet v. Field, 9 Gray 329; Bozeman v. Allen, 48 Ala. 512; Haight v. Joyce, 2 Cal. 64; Thorne v. Yontz, 4 Cal. 321; New v. Walker, 6 West. Rep. (Ind.) 869; Hemenway v. Cropsey, 37 Ill. 357; Cumberland Bank v. Mayberry, 48 Me. 198; Taylor v. Page, 6 Allen 86; Williams v. Cheney, 3 Gray 215; Cranson v. Goss, 107 Mass. 439; Vinton v. Peck, 14 Mich. 287; Young v. Berkley, 2 N. H. 410; Williams v. Little, 11 N. H. 66; Great Falls Bank v. Farmington, 41 N. H. 32; Clark v. Pease, 41 N. H. 414; State Bank v. Thompson, 42 N. H. 369; Baker v. Arnold, 3 Cai. 279; Willmarth v. Crawford, 10 Wend. 341; Grimes v. Hillenbrand, 4 Hun 354; Converse v. Foster, 32 Vt. 828; Pendar v. Kelley, 48 Vt. 27; Streit v. Waugh, 48 Vt. 298; Johnson v. Meeker, 1 Wisc. 436; Knox v. Clifford, 38 Wisc. 651; Hatch v. Burroughs, 1 Woods 439.

The effect of indorsing a negotiable instrument is twofold: it not only establishes a contractual relation between the immediate parties to the indorsement, but it passes title to the instrument. It follows that, if the consideration for the indorsement be illegal, that fact will constitute a defence to an action by the indorsee against the indorser, for the contract between them is executory; but it will not avail a prior party, because illegality in the consideration does not interfere with the vesting of title; Million v. Ohnsorg, 10 Mo. App. 432.

The question of how closely connected with a contract the illegality must be in order to taint it is one to which it is most difficult to give a general answer, and no fast rule can be laid down on the subject. The principle that governs the cases is simply the general one of public policy, and the illegality of the contract depends ultimately on the affirmative answer to the question, is the encouragement of this class of contracts against public policy? "The test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal

transaction to establish his case," is the rule laid down in Swan v. Scott, 11 S. & R. 155, and adopted in many cases; Scott v. Duffy, 14 Penn. St. 18; Yarborough v. Avant, 66 Ala. 526; Ware v. Curry, 67 Ala. 274; Chouteau v. Allen, 70 Mo. 290; Buck v. Albee, 26 Vt. 184; Bates v. Watson, 1 Sneed 376; Wooten v. Miller, 7 Sm. & M. 380; Roby v. West, 4 N. H. 285. But this rule is much too narrow, and the court in Swan v. Scott, supra, say further, "If a plaintiff cannot open his case without showing that he has broken the law, a court will not assist him, whatever his claims in justice may be upon the defendant; and if the illegality be malum prohibitum only, the plaintiff may recover, unless it be directly on the forbidden contract, a bond the consideration of which grows out of an illegal transaction; there the illegal consideration is the sole basis of the bond, and there can be no recovery." In Parsons v. Randolph, 4 West. Rep. (Mo.) 863, it is said in reference to the rule above quoted: "This rule can only apply to that class of actions where the cause of action is not essentially based upon something which was illegal, but upon some supervening right not depending immediately upon the illegal transaction for its support." The law on this question can be best understood by grouping the cases into classes, without endeavoring to make the decisions conform to any rule that will serve as a criterion except the one mentioned, that of public policy.

Any contract made for the purpose of giving effect to a previous illegal contract is illegal; Carrington v. Caller, 2 Stew. (Ala.) 175; Chancely v. Bailey, 37 Ga. 532; Hall v. Gavitt, 18 Ind. 390; Heidenrich v. Leonard, 21 La. Ann. 628; Holden v. Cosgrove, 12 Gray 216; Howe v. Litchfield, 3 Allen 443; Claffin v. Torlina, 56 Mo. 369; Crossley v. Moore, 40 N. J. L. 27; Coulter v. Robinson, 14 Sm. & M. 18; Bank v. Young, 37 Mo. 398; Carroll v. Shields, 4 E. D. Smith 466; Shelton v. Marshall, 16 Tex. 344; Everingham v. Meighan, 55 Wisc. 354. Agreements made in substitution of illegal contracts are void, as where a note is given for an illegal consideration, and the first note is taken up by another, the second one is void; Fell v. Cook, 44 Ia. 485; Glass v. Alt, 17 Kans. 444; Pierce v. Kibbee, 51 Vt. 559; Niver v. Best, 10 Barb. 369; Cotton v. Brien, 6 Rob. (La.) 115; Steele v. Holt, 75 N. C. 188. But where the parties to an illegal contract rescind it, and supersede it by a new contract which is not tainted with illegality, the latter can be enforced; Chadbourn v. Watts, 10 Mass. 120; Webster v. Sturges, 7 Bradw. 560. A contract that has its origin in a previous illegal contract cannot be enforced; Burton v. Stewart, 62 Barb. 194; Gray v. Hook, 4 Comst. 449; Howard v. Harris, 8 Allen 297; Sturges v. Bush, 5 Day 452; Outen v. Rodes, 3 A. K. Marsh 432; Kingsbury v. Suit, 66 N. C. 601; Bates v. Watson, 1 Sneed 376. A new agreement made for the purpose of carrying into effect any of the unexecuted provisions of a previous illegal contract is void; Barton v. Port Jackson Co., 17 Barb. 397. But a contract made after an illegal act has been done, and independent of the act, although the consequence of it, is good; Armstrong v. Toler, 11 Wheat. 258.

A surety for the performance of an illegal contract cannot be held; Swift v. Beers, 3 Denio 70; Safford v. Wyckoff, 1 Hill 11; Batten v. Faulk, 4 Jones (N. C.) L. 233; Harley v. Stapleton, 24 Mo. 248; Lyle v. Lindsey, 5 B. Mon. 123; Nourse v. Pope, 13 Allen 87; Denison v. Gibson, 24 Mich. 187. And a contract to indemnify such a surety is void; Hill v. Sherwood, 3 Wisc. 343; Perkins v. Cummings, 2 Gray 258. An agreement to indemnify one from liability on an illegal contract is void; Hayden v. Davis, 3 McLean 276; Smith v. Strong, 2 Hill (N. Y.) 241; Columbia Bank v. Haldeman, 7 W. & S. 233. So also is an agreement to indemnify one from liability for an illegal act; Collier's Admr. v. Windham, 27 Ala. 291; James v. Hendree, 34 Ala. 488; Buffendeau v. Brooks, 28 Cal. 641; Hodson v. Wilkins, 7 Me. 113; Babcock v. Terry, 97 Mass. 482; Ayer v. Hutchins, 4 Mass. 370; Love v. Palmer, 7 Johns. (N. Y.) 159; Richmond v. Roberts, Id. 319; Webber v. Blunt, 19 Wend. 188; Bierbauer v. Wirth, 5 Fed. Rep. 336. But a contract to indemnify one against a past illegal act is good unless made pursuant to a previous agreement; Given v. Driggs, 1 Caines (N. Y.) 450; Doty v. Wilson, 14 Johns. (N. Y.) 378; Kneeland v. Rogers, 2 Hall 579; 10 Wend. 218; 13 Id. 114; Hunter v. Agee, 5 Humph. 57; Lea v. Collins, 4 Sneed 393; Hall v. Huntoon, 17 Vt. 244; Atkins v. Johnson, 43 Vt. 78.

If part of the consideration in a contract is illegal, the entire contract is affected thereby and rendered void; Barton v. Port Jackson, etc., Co., 17 Barb. 397; Carleton v. Whiteher, 5 N. H. 196; Collins v. Merrell, 2 Met. (Ky.) 163; Pettit v. Pettit, 32 Ala. 288; Kennett v. Chambers, 14 How. (U. S.) 38; Rose v. Truax, 21 Barb. 361; Filson's Trustees v. Himes, 5

Penn. St. 452; Snyder v. Willey, 33 Mich. 483; Deering v. Chapman, 22 Me. 488; Averbeck v. Hall, 14 Bush 505; Lindsay v. Smith, 78 N. C. 328; Hinds v. Chamberlin, 6 N. H. 225; Burlington, Cedar Rapids R. R. Co. v. Northwestern Fuel Co., 31 Fed. Rep. 652; unless the contract be severable; Carleton v. Woods, 28 N. H. 290. See also Potts v. Gray, 3 Coldw. 468; Hoyt v. Macon, 2 Col. 502.

No ratification of an illegal contract will remove the taint of illegality, even if the ratification takes place after the object of the contract has been accomplished; Fireman's Charitable Association v. Berghaus, 13 La. Ann. 209; Wheeler v. Wheeler, 5 Lans. 355; McKee v. Cheney, 52 How. Pr. 144; Robinson v. Kalbfleisch, 5 T. & C. 212; Negley v. Lindsay, 67 Penn. St. 217; Hunter v. Nolf, 71 Penn. St. 282; but cf. Stout v. Ennis, 28 Kans. 706.

It is in the class of cases just discussed that the question whether a contract made void by statute is for that reason illegal must be answered. As has been said, where the contract comes directly within the terms of the statute, it is void whether illegal or not, but where a contract void by statute forms the basis of another contract, or is connected with another contract in such a way that, if illegal, the taint will affect the latter, then the court must determine whether the policy of the statute requires that it shall be declared unlawful. An example of contracts void by statute which are not illegal is found in the case of contracts declared void unless in writing, and such contracts may form the basis of other contracts, or be connected with other contracts, without thereby rendering the subsequent contracts void.

As the policy of the law may change after the making of the contract, it is important to determine what is the point of time which fixes the legality or illegality of a contract. The rule is that the validity of the contract is to be determined by the law as it existed at the time of the making of the contract; Calhoun v. Calhoun, 2 So. Car. 283; Powell v. Daniel, 23 La. Ann. 289; Wilkinson v. Cook, 44 Miss. 367; Osborn v. Nicholson, 13 Wall. 654; Harrell v. Watson, 63 N. C. 454; Boyce v. Tabb, 18 Wall. 546; McElvain v. Mudd, 44 Ala. 48; Roundtree v. Baker, 52 'Ill. 241; Hall v. Keese, 31 Tex. 504. And therefore if a contract is illegal by reason of the violation of a statute, a subsequent repeal of the statute can-

not give it validity; Roby v. West, 4 N. H. 285; nor, if illegal by reason of the imposition of a penalty for violation of a statutory provision, will the remission of the penalty by the government render the contract valid between the parties; Petrel Guano Co. v. Jarnette, 25 Fed. Rep. 675. This principle above stated has been applied by the United States Supreme Court to the case of bonds purchased in good faith as legally issued, in reliance on a decision of a State court, in which case a subsequent change of view in regard to the legality of the issue on the part of the State court will not be allowed to affect such bonds; Gelpcke v. City of Dubuque, 1 Wall. 175. Such a change of opinion must be regarded in the same light as a change of policy brought about by the enactment of a statute.

In considering questions of the validity of contracts, regard must be had not only to the law of the place of execution, but frequently to the law of the place of performance, and to the law of the forum. The general rule is, that the lex loci contractus determines the validity of the contract; Greenwood v. Curtis, 6 Mass. 358; Weil v. Golden, 2 New Eng. Rep. (Mass.) 235; Stewart v. Schall, 65 Md. 289; Shelton v. Marshall, 16 Tex. 344; Brown v. Nevitt, 27 Miss. 801; Phinney v. Baldwin, 16 Ill. 108; Torrey v. Corliss, 33 Me. 333; Kennedy v. Cochrane, 65 Me. 594, and this rule is without exception where by that law the contract is invalid; Shelton v. Marshall, supra; Weil v. Golden, supra; Kennedy v. Cochrane, supra; Root v. Merriam, 27 Fed. Rep. 909. The cases of Adams v. Robertson, 37 Ill. 45; and Vimont v. C. & N. W. Ry. Co., 22 N. W. Rep. (Ia.) 906, contra, must be considered wrong. But the rule is subject to two exceptions, in cases where the contract is valid by the law of the place of the making of the contract. 1. If the contract is considered against good morals, or bad by the common law of the forum, the lex fori governs; Greenwood v. Curtis, 6 Mass. 358; Flagg v. Baldwin, 38 N. J. Eq. 219; Oscanyan v. Arms Co., 103 U.S. 261; but see Nichols v. Lumpkin, 51 N. Y. Super. 88, 95; Champion v. Wilson, 64 Ga. 184; but not where it is bad only by the statute law of the forum; Swann v. Swann, 21 Fed. Rep. 299; Adams v. Gay, 19 Vt. 358. 2. The second exception is that when the contract is contrary to the laws of the place where the contract is to be performed, it is illegal; Kennett v. Chambers, 14 How. (U.S.) 38; Jewell v.

Wright, 30 N. Y. 259; Fisher v. Lord, 63 N. H. 514; but it is said that to render a contract void, as violating the law of the place of performance, it must be shown not only that both parties knew that a violation of the law was contemplated, but that some act must have been done in furtherance of the design to violate that law; Merchants Bank v. Spalding, 9 N. Y. 53. If a contract be illegal by the lex fori, it will be held void, unless the place of the making of the contract, and the law of that place, be shown; Thatcher v. Morris, 1 Kern. 437.

There are two classes of cases in which contracts confessedly illegal are enforced; one is where the parties are not in pari delicto; the other where an innocent third party would suffer by allowing the illegality to be used as a defence. Where one of the parties to an illegal contract has been induced to enter it by fraud or by undue influence, the parties are not regarded as in pari delicto; Harrington v. Grant, 54 Vt. 236; Ford v. Harrington, 16 N. Y. 285; Hinsdill v. White, 34 Vt. 558. is also laid down that where a statute imposes a penalty on one party to a prohibited contract and not on the other, they are not in pari delicto, and the party on whom the penalty is imposed can be compelled to make restitution of money or property received under the contract. But this is not accomplished by an enforcement of the contract, but on the theory of an implied contract raised for the benefit of the less guilty party; Tracy v. Talmage, 4 Kern. 162; Schermerhorn v. Talman, 4 Kern. 93; White v. Franklin Bank, 22 Pick. 181.

If the effect of allowing one of the contracting parties to avoid an illegal contract would be to injure innocent third parties, the contract will be enforced; White Mountains R. R. Co. v. Eastman, 34 N. H. 124; Blodgett v. Morrill, 20 Vt. 509; Robinson v. Pittsburgh & Connellsville R. R. Co., 32 Penn. St. 334; Ridgefield & N. Y. R. R. Co. v. Brush, 43 Conn. 86; Swartwout v. Michigan Air Line Co., 24 Mich. 389; Upton v. Hansbrough, 3 Biss. 417; Upton v. Tribilcock, 91 U. S. 45; Pueblo & Ark. Valley R. R. Co. v. Taylor, 6 Col. 1; Sternburg v. Bowman, 103 Mass. 325.

The general rule of pleading applicable to the case of illegality is, that where an action is brought on a contract which is claimed to be void on the ground of illegality, the defendant may avail himself of this defence without a special plea, but if it is only voidable, a special plea is required. There is logically no distinction

between contracts illegal by the common law, and such as are illegal by reason of the existence of some statute. Yet the cases hold generally that, while illegality by common law can be availed of under a general denial, or a plea of non est factum to a bond; Snyder v. Willey, 33 Mich. 483; Oscanyan v. Arms Co., 103 U. S. 261; Cary v. Western Union Tel. Co., 47 Hun 610: S. C., 20 Abb. N. C. 333 (pp. 353 to 359 contain a collection of New York cases on this subject); Valentine v. Stewart, 15 Cal. 387; May v. Burras, 13 Abb. N. C. 384; Shenk v. Phelps, 6 Bradw. 612; Nellis v. Clark, 20 Wend. 24; there must be a special plea where the illegality is due to the existence of a statute; Fox v. Mensch, 3 W. & S. 444; Commissioners of the Poor v. Hanion, 1 N. & McC. 554; Commiskey v. Williams, 2 West. Rep. (Mo.) 604. It is said, however, notwithstanding these latter decisions, that the court may at any time interfere and refuse to entertain an action brought on an illegal contract, from whatever cause the illegality may arise; Cardoze v. Swift, 113 Mass. 250; Valentine v. Stewart, 15 Cal. 387, 405; Oscanyan v. Arms Co., 103 U. S. 261, 267, where the court said that, assuming the contract to be illegal, "the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice." From these cases it would appear that, while a defendant who has not pleaded properly cannot complain if the court refuse to allow him to avail himself of the defence of illegality, the plaintiff cannot complain if the court refuses its aid even when the defendant has not raised the issue of illegality.

MITCHEL v. REYNOLDS.

HIL. 1711. - B. R.

[REPORTED 1 P. WILLIAMS, 181.]

A bond or promise to restrain one's self from trading in a particular place, if made upon a reasonable consideration, is good. Secus, if it be on no reasonable consideration, or to restrain a man from trading at all.

Debt upon a bond (a). The defendant prayed oyer of the condition, which recited, that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in Liquorpond Street, in the parish of St. Andrew's, Holborn, for the term of five years: now if the defendant should not exercise the trade of a baker within that parish, during the said term, or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of fifty pounds, then the said obligation to be void. Quibus lectis et auditis, he pleaded, that he was a baker by trade, that he had served an apprentice-ship to it, ratione cujus the said bond was void in law, per quod he did trade, prout ei bene licuit. Whereupon the plaintiff demurred in law.

And now, after this matter had been several times argued at the bar, *Parker*, C. J., delivered the resolution of the court.

The general question upon this record is, whether this bond, being made in restraint of trade, be good?

And we are all of opinion, that a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into it, the same is good; and that the

⁽a) 10 Mod. 27, 85, 130; Fort. 296; Resolution of the court of B. R.

true distinction of this case is, not between promises and bonds, but between contracts with and without consideration; and that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by.

The resolutions of the books upon these contracts seeming to disagree, I will endeavor to state the law upon this head, and to reconcile the jarring opinions; in order whereunto I shall proceed in the following method:—

1st. Give a general view of the cases relating to the restraint of trade.

2dly. Make some observations from them.

3dly. Show the reasons of the differences which are to be found in these cases; and

4thly. Apply the whole to the case at bar.

As to the cases, they are either, first, of involuntary restraints against, or without a man's own consent: or, secondly, of voluntary restraints by agreement of the parties.

Involuntary restraints may be reduced under these heads:—
1st. Grants or charters from the crown.

2dly. Customs.

3dly. By-laws.

Grants or charters from the crown may be,

1st. A new charter of incorporation to trade generally, exclusive of all others, and this is void; 8 Co. 121.

2dly. A grant to particular persons for the sole exercise of any known trade: and this is void, because it is a monopoly, and against the policy of the common law, and contrary to *Magna Charta*; 11 Co. 84.

3dly. A grant of the sole use of a new invented art, and this is good, being indulged for the encouragement of ingenuity; but this is tied up by the statute of (a) 21 Jac. 1, cap. 3, s. 6, to the term of fourteen years; for after that time it is presumed to be a known trade, and to have spread itself among the people.

⁽a) [See now the Consolidating and Amending Act, 46 & 47 Vict. c. 57.]

Restraints by custom are of three sorts: -

1st. Such as are for the benefit of some particular persons, who are alleged to use a trade for the advantage of a community, which are good; 8 Co. 125; Cro. Eliz. 803; 1 Leon. 142; Mich. 22 H. 6. 614; 2 Bulst. 195; 1 Roll. Abr. 561.

2dly. For the benefit of a community of persons who are not alleged, but supposed to use the trade, in order to exclude foreigners; (a) Dyer, 279, b; W. Jones, 162; 8 Co. 121; 11 Co. 52; Carter, 68, 114, held good.

3dly. A custom may be good to restrain a trade in a particular place, though none are either supposed or alleged to use it; as in the case of *Rippon*. Register 105, 106.

Restraints of trade by by-laws are these several ways: -

1st. To exclude foreigners; and this is good, if only to enforce a precedent custom by a penalty; Carter 68. 114; 8 Co. 125 (b). But where there is no precedent custom, such bylaw is void; 1 Roll. Abr. 364; Hob. 210; 1 Bulst. 11; 3 Keb. 808 (c). But the case in Keble is misreported; for there the defendants did not plead a custom to exclude foreigners, but only generally to make by-laws, which was the ground of the resolution in that case.

2dly. All by-laws made to cramp trade in general are void; Moor 576; 2 Inst. 47; 1 Bulst. 11.

3dly. By-laws made to restrain trade, in order to the better government and regulation of it, are good, in some cases (d), viz. if they are for the benefit of the place, or to avoid public inconveniences, nuisances, &c. Or for the advantage of the trade, and improvement of the commodity; Sid. 284; Raym. 288; 2 Keb. 27. 873; and 5 Co. 62. b.; which last is upon the by-law for bringing all broadcloth to Blackwell Hall, there to be viewed and marked, and to pay a penny per piece for marking: this was held a reasonable by-law; and indeed it seems to be only a fixing of the market; for one end of all markets is, that the commodity may be viewed; but then they must not make people pay unreasonably for the liberty of trading there.

⁽a) Restraints of this kind, whether by custom or by law, [were] abolished in all boroughs by st. 5 & 6 W. 4, c. 76, s. 14. [See now 45 & 46 Vict. c. 50, s. 247. These Acts do] not affect London.

⁽b) Wolley v. Idle, 4 Burr. 1951.

⁽c) Vide Harrison v. Goodman, 1 Burr. 12; Hesketh v. Braddock, 3 Burr. 1856.

⁽d) Wannel v. Chamber of the City of London, 1 Stra. 675; The King v. Harrison, 3 Burr. 1322; Pierce v. Bartrum, Cowp. 269.

In 2 Keb. 309, the case is upon a by-law for restraining silk-throwsters from using more than such a certain number of spindles, and there the by-law would have been good, if the reasons given for it had been true.

Voluntary restraints by agreement of the parties are either, 1st. General, or

2dly. Particular, as to places or persons.

General restraints are all void, whether by bond, covenant or promise, &c., with or without consideration, and whether it be of the party's own trade or not. Cro. Jac. 596. 2 Bulst. 136. Allon 67.

Particular restraints are either, 1st, without consideration, all of which are void by what sort of contract soever created. 2 H. 5. 5. Moor. 115. 242. 2 Leon. 210. Cro. Eliz. 872. Noy 98. Owen 143. 2 Keb. 377. March 191. Show. 2 (not well reported). 1 Saund. 155.

Or 2dly, particular restraints are with consideration.

Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good. 2 Bulst. 136. Rogers v. Parry. Though that case is wrongly reported, as appears by the roll which I have caused to be searched, it is B. R. Trin. 11 Jac. 1 Rot. 223. And the resolution of the judges was not grounded upon its being a particular restraint, but upon its being a particular restraint with a consideration, and the stress lies on the words, as the case is here, though, as they stand in the book, they do not seem material. Noy 98. W. Jones 13. Cro. Jac. 596. In that case, all the reasons are clearly stated, and, indeed, all the books, when carefully examined, seem to concur in the distinction of restraints general and restraints particular, and with or without consideration, which stands upon very good foundation; Volenti non fit injuria: a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another in a particular place.

Palm. 171. Bragg v. Stanner. The entering upon the trade, and not whether the right of action accrued by bond, promise, or covenant, was the consideration in that case.

Vide March's Rep. 77, but more particularly Allen's 67, where there is a very remarkable case, which lays down this distinction, and puts it upon the consideration and reason of the thing.

Secondly, I come now to make some observations that may be useful in the understanding of these cases. And they are,

1st. That to obtain the sole exercise of any known trade throughout *England* is a complete monopoly, and against the policy of the law.

2dly. That when restrained to particular places or persons (if lawfully and fairly obtained), the same is not a monopoly.

3dly. That since these restraints may be by custom, and custom must have a good foundation, therefore the thing is not absolutely, and in itself, unlawful.

4thly. That it is lawful upon good consideration for a man to part with his trade.

5thly. That since actions upon the case are actions injuriarum, it has been always held that such actions will lie for a man's using a trade contrary to custom, or his own agreement; for there he uses it injuriously.

6thly. That where the law allows a restraint of trade, it is not unlawful to enforce it with a penalty.

7thly. That no man can contract not to use his trade at all. 8thly. That a particular restraint is not good without just reason and consideration.

Thirdly, I propose to give the reasons of the differences which we find in the cases; and this I will do,

1st. With respect to involuntary restraints, and

2dly. With regard to such restraints as are voluntary.

As to involuntary restraints, the first reason why such of these as are created by grants and charters from the crown and by-laws generally are void, is drawn from the encouragement which the law gives to trade and honest industry, and that they are contrary to the liberty of the subject.

2dly. Another reason is drawn from Magna Charta, which is infringed by these acts of power; that statute says, Nullus liber homo, &c., disseisetur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis, &c., and these words have been always taken to extend to freedom of trade.

But none of the cases of customs, by-laws to enforce these customs, and patents for the sole use of a new invented art, are within any of these reasons; for here no man is abridged of his liberty, or disseised of his freehold; a custom is lex loci, and foreigners have no pretence of right in a particular society, exempt from the laws of that society; and as to new invented

arts, nobody can be said to have a right to that which was not in being before; and therefore it is but a reasonable reward to ingenuity and uncommon industry.

I shall show the reason of the differences in the cases of voluntary restraint.

1st. Negatively.

2dly. Affirmatively.

I. Negatively; the true reason of the disallowance of these in any case is never drawn from Magna Charta; for a man may, voluntarily, and by his own act, put himself out of the possession of his freehold; he may sell it, or give it away at his pleasure.

2dly. Neither is it a reason against them that they are contrary to the liberty of the subject; for a man may, by his own consent, for a valuable consideration, part with his liberty; as in the case of a covenant not to erect a mill upon his own lands. J. Jones 13, Mich. 4 Ed. 3, 57. And when any of these are at any time mentioned as reasons upon the head of voluntary restraints, they are to be taken only as general instances of the favor and indulgence of the law to trade and industry.

3dly. It is not a reason against them, that they are against law, I mean in a proper sense, for in an improper sense they are.

All the instances of conditions against law in a proper sense are reducible under one of these heads.

1st. Either to do something that is malum in se, or malum prohibitum. 1 Inst. 206.

2dly. To omit the doing of something that is a duty. Palm. 172. Hob. 12. Norton v. Sims.

3dly. To encourage such crimes and omissions. Fitzherb. tit. Obligation, 13. Bro. tit. Obligation, 34. Dyer 118.

Such conditions as these the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes; and therefore, as in 1 Inst. 206, a feoffment shall be absolute for an unlawful condition, and a bond void. But from hence I would infer,

1st. That where there may be a way found out to perform the condition, without a breach of the law, it shall be good. Hob. 12. Cro. Car. 22. Perk. 228.

2dly. That all things prohibited (a) by law may be restrained by condition; and therefore these particular restraints of trade, not being against law, in a proper sense, as being neither mala in se, nor mala prohibita, and the law allowing them in some instances, as in those of customs and assumpsits, they may be restrained by condition.

II. Affirmatively; the true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, 1st, the mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2dly, to the public, by depriving it of a useful member.

Another reason is, the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them lest they should prejudice them in their custom when they come to set up for themselves.

3dly. Because, in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout *England*; for what does it signify to a tradesman in *London* what another does at *Newcastle?* and surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The *Roman* law would not enforce such contracts by an action. See Puff. lib. 5, c. 2, sect. 3; 21 H. 7, 20.

4thly. The fourth reason is in favor of these contracts, and is that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked with any particular trade: or in case of an old man, who finding himself under such circumstances, either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom he may procure to himself a livelihood, which he might probably have lost by trading longer.

5thly. The law is not so unreasonable as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a

certain damage upon another, as it must do if contracts with a consideration were made void; *Barrow* v. *Wood*, March Rep. 77; Mich. 7 Ed. 3. 65; Allen 67. 8 Co. 121.

But here it may be made a question, that suppose it does not appear whether or no the contract be made upon good consideration, or be merely injurious and oppressive, what shall be done in this case?

Resp. I do not see why that should not be shown by pleading; though certainly the law might be settled either way without prejudice; but as it now stands, the rule is, that wherever such contract stat indifferenter, and, for aught appears, may be either good or bad, the law presumes it primâ facie to be bad, and that for these reasons:—

1st. In favor of trade and honest industry.

2dly. For that there plainly appears a mischief, but the benefit (if any) can be only presumed; and in that case, the presumptive benefit shall be overborne by the apparent mischief.

3dly. For that the mischief (as I have shown before) is not only private, but public.

4thly. There is a sort of presumption, that it is not of any benefit to the obligee himself, because, it being a general mischief to the public, everybody is affected thereby; for it is to be observed, that though it be not shown to be the party's trade or livelihood, or that he had no estate to subsist on, yet all the books condemn those bonds, on that reason, viz. as taking away the obligor's livelihood, which proves that the law presumes it; and this presumption answers all the difficulties that are to be found in the books.

As, 1st, That all contracts, where there is a bare restraint of trade and no more, must be void; but this taking place only where the consideration is not shown, can be no reason why, in cases where the special matter appears, so as to make it a reasonable and useful contract, it should not be good; for there the presumption is excluded, and therefore the courts of justice will enforce these latter contracts, but not the former.

2dly. It answers the objection, that a bond does not want a consideration, but is a perfect contract without it; for the law allows no action on a nudum pactum, but every contract must have a consideration, either expressed, as in assumpsits, or implied, as in bonds and covenants, but these latter, though they are perfect as to the form, yet may be void as to the matter: as

in a covenant to stand seised, which is void without a consideration, though it be a complete and perfect deed.

3dly. It shows why a contract not to trade in any part of England, though with consideration, is void; for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some, unless he intends a monopoly, which is a crime.

4thly. This shows why promises in restraint of trade have been held good; for in those contracts, it is always necessary to show the consideration, so that the presumption of injury could not take place, but it must be governed by the special matter shown. And it also accounts not only for all the resolutions, but even all the expressions that are used in our books in these cases; it at least excuses the vehemence of Judge Hull in 2 H. 5, fol. quinto; for suppose (as that case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare that he would not follow it any more, &c., at which instant some designing fellow should work him up to such a pitch as, for a trifling matter, to give a bond not to work at it again, and afterwards, when the necessities of his family and the cries of his children send him to the loom, should take advantage of the forfeiture, and put the bond in suit; I must own. I think, this such a piece of villainy as is hard to find a name for; and therefore cannot but approve of the indignation that judge expressed, though not his manner of expressing it. Surely, it is not fitting that such unreasonable mischievous contracts should be countenanced, much less executed by a court of justice.

As to the general indefinite distinction made between bonds and promises in this case, it is in plain words this, that the agreement itself is good, but when it is reduced into the form of a bond, it immediately becomes void; but for what reason see 3 Lev. 241. Now, a bond may be considered two ways, either as a security, or as a compensation; and,

1st. Why should it be void as a security? Can a man be bound too fast from doing an injury? which I have proved the using of a trade contrary to custom or promise to be.

2dly. Why should it be void as a compensation? Is there any reason why parties of full age, and capable of contract-

ing, may not settle the *quantum* of damages for such an injury? Bract., lib. 3, c. 2, s. 4.

It would be very strange, that the law of England, that (a) delights so much in certainty, should make a contract void when reduced to certainty, which was good when loose and uncertain: the cases in *March's Rep.* 77, 101, and also *Show.* 2, are but indifferently reported, and not warranted by the authorities they build upon.

1st Objection. In a bond the whole penalty is to be recovered, but in assumpsit only the damages.

Resp. This objection holds equally against all bonds what-soever.

2d *Object*. Another objection was, that this is like the case of an infant, who may make a promise but not a bond; or that of a sheriff, who cannot take a bond for fees.

Resp. The case of an infant stands on another reason, viz. a general disability to make a deed, but here both parties are capable; neither is it the nature of the bond, but merely the incapacity of the infant, which makes a bond by him void, since there a surety would be liable; but it is otherwise here.

Also the case of a sheriff is very different; for at common law he could take nothing for doing his duty, but the statute has given him certain fees; but he can neither take more, nor a chance for more, than that allows him.

3d Object. It was further objected, that a promise is good, and a bond void, because the former leaves the matter more at large to be tried by a jury; but what is there to be tried by a jury in this case?

Resp. 1st. It is to be tried whether upon consideration of the circumstances the contract be good or not; and that is matter of law, not fit for a jury to determine.

2dly. It is to ascertain the damages; but *cui bono* (say they) should that be done? Is it for the benefit of the obligor?

Resp. Certainly it may be necessary on that account, for these reasons:—

1st. A bond is a more favorable contract for him than a promise; for the penalty is a repurchase of his trade ascertained beforehand (b), and on payment thereof he shall have it again;

⁽a) Grantham v. Gordon, 1 P. Will-Bro. Cha. Rep. 419, note. [See Howiams, 614.

Bro. Cha. Rep. 419, note. [See Howard, 34 L. J. Cha. 47.]

⁽b) Sed ride Hardy v. Martin, 1

he may rather choose to be bound not to do it under a penalty, than not to do it at all.

2dly. However it be, it is his own act.

3dly. He can suffer only by his knavery, and surely courts of justice are not concerned lest a man should pay too dear for being a knave.

4thly. Restraints by custom may (as I have proved) be enforced with penalties which are imposed without the party's consent; nay, by the injured party without the concurrence of the other; and if so, then *a fortiori* he may bind himself by a penalty.

Object. It may perhaps be objected, that a false recital of a consideration in the condition may subject a man to an inconvenience, which the law so much labors to prevent.

Resp. But this is no more to be presumed than false testimony, and in such a case I should think the defendant might aver against it; for though the rule be, that a man is estopped from averring against anything in his own deed, yet that is, supposing it to be his deed; for where it is void, it is otherwise, as in the case of an usurious contract (a).

The application of this to the case at bar is very plain. Here the particular circumstances and considerations are set forth, upon which the court is to judge whether it be a reasonable and useful contract.

The plaintiff took a baker's house, and the question is whether he or the defendant shall have the trade of this neighborhood? The concern of the public is equal on both sides.

What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration, *viz.* the term of five years.

To conclude: In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract it ought to be maintained.

For these reasons we are of opinion, that the plaintiff ought to have judgment.

⁽a) Accord. Collins v. Blantern, ante, p. 646, et notee.

"The general rule is, that all restraints of trade, which the law so much favors, if nothing more appear, are bad. This is the rule which is laid down in the famous case of Mitchel v. Reynolds, which is well reported in 1 P. Wms. 181, in which Lord Macclesfield took such great pains, and in which all the cases and arguments in relation to this matter are thoroughly weighed and considered: but to this general rule there are some exceptions; as, first, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the party restrained. A contract or agreement upon such consideration, so restraining a particular person, may be good and valid in law, notwithstanding the general rule, and this was the very case of Mitchel v. Reynolds." Per Willes, C. J., in the Master, &c., of Gunmakers v. Fell, Willes, 388. See Stuart v. Nicholson, 3 Bing, N. C. 113. The same principles are recognized in the judgment of the court in Gale v. Reed, 8 East, 83, in a variety of cases, both previous and subsequent, particularly in Chesman v. Nainby, 2 Str. 739; 3 Bro. P. C. 349; which received the successive decisions of the King's Bench, Common Pleas, and House of Lords.

The reader will find all the authorities collected in Young v. Timmins, 1 Tyrwh. 226; 1 C. & J. 331; and the rule to be collected from them all is stated in that case by Vaughan, B., p. 241, viz., "any agreement by bond or otherwise in general restraint of trade is illegal and void. But such a security given to effect a partial restraint of trade may be good or bad, according as the consideration is adequate or inadequate." In order, therefore, that a contract in restraint of trade may be valid at law (for even then equity is loath to enforce it specifically, if the terms be at all hard, or even complex, Kimberly v. Jennings, 1 Sim. 340, though in [many] cases it will do so, Kemble v. Kean, 6 Sim. 335; Whittaker v. Howe, 3 Beav. 383 [Avery v. Langford, Kay, 663; Turner v. Evans, 2 De G. M. & G. 746; Benwell v. Inns, 24 Beav. 307; 26 L. J. Ch. 663; Swallow v. Wallingford, 12 Jur. 404; Gravely v. Barnard, 43 L. J. Ch. 659]); the restraint must be first partial; secondly, upon an adequate, or, as the rule now seems to be, not on a mere colorable consideration; and there is a third requisite, namely, that it should be reasonable, the meaning of which shall be presently considered.

First, the restraint must be partial. It was decided so early as the reign of Henry V. that a contract imposing a general restraint on trade is void. Indeed, Hull, J., flew into a passion at the very sight of a bond imposing such a condition, and exclaimed, with more fervor than decency; "A ma intent yous purres aver demurre sur luy que l'obligation est voide eo que le condition est encounter common ley, et per Dieu, si le plaintiff fuit icy, il irra al prison tanque il ust fait fine au Roy." [2 Hen. V. fo. 5, pl. 26.] "The law," said Best, C. J., in Homer v. Ashford, 3 Bing. 328, "will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom, would be void. But it may often happen that individual interest and general convenience render engagements not to carry on trade, or to act in a profession, in a particular place, proper." Such partial restraints were upheld in Chesman v. Nainby, in Clerk v. Comer, Cas. temp. Hardw. 53, where a bond was conditioned not to carry on trade within the city of Westminster, or bills of mortality; in Davis v. Mason, 5 T. R. 118, and in Bunn v. Guy, 4 East, 190, where an attorney bound himself not to practise within London, and 150 miles from thence. See remarks on this case in Bozon v. Farlow, Meriv. 472. In Whittaker v. Howe, 3 Beav. 383, a case which seems to go further than any other, and the correctness of which, notwithstanding the elaborate reasoning whereon

the judgment proceeded, may perhaps be questioned; the agreement was by attorneys and solicitors not to practise in Great Britain for the space of twenty years without the consent of the gentlemen to whom they had sold their business, and Lord Langdale, M. R., "having regard to the nature of the profession, to the limitation of time, and to the decision that the distance of 100 miles does not describe an unreasonable boundary," upheld the contract. [For the same reason a covenant by a horse-hair manufacturer not to carry on trade within 200 miles of Birmingham was held binding, Harms v. Parsons, 32 L. J. Ch. 247; and see Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 355, 39 L. J. Ch. 86, where a restriction extending throughout Europe was enforced.]

In Proctor v. Sargent, 2 M. & G. 31, 2 Scott, N. R. 289, S. C., the contract was that the defendant, who was about to enter the service of the plaintiff, a cowkeeper and milkman, should not during the service, or within two years after quitting or being discharged therefrom, carry on the business of a cowkeeper, milkman, milk-seller, or milk-carrier within five miles of Northampton square. [And see Benwell v. Inns, 24 Beav. 307, where an injunction to restrain the breach of a similar agreement was granted.] In Rannie v. Irvine, 8 Scott, N. R. 674, 7 M. & Gr. 969, S. C., it was against soliciting the custom of or knowingly supplying bread or flour to any of the customers then dealing at a baker's shop, the lease and goodwill of which were sold. In Leighton v. Wales, 3 M. & W. 545, the restraint was against running any coach on a particular road. [In Mumford v. Gething, 7 C. B., N. S. 305, the restraint was upon a commercial traveller and against his ever travelling for any other firm than the plaintiff's within the district in which they employed him.]

In Gale v. Reed, 8 East 79, the restraint was partial in a different way. There the defendant covenanted not to exercise the business of a rope-maker during his life, except on government contracts, and to employ the plaintiffs exclusively to make all the cordage which should be ordered of him by his friends or connections. The plaintiffs were to allow him two shillings per cwt. on the cordage made on his recommendation for such of his friends or connections whose debts should turn out to be good; and were not to be compelled to furnish goods to any whom they should be disinclined to trust. The court held this agreement good, considering that they must construe the whole of it together, and that, construing it together, it appeared not to be the intention of the plaintiffs to restrain the defendant from supplying such of his connections as they themselves did not think fit to trust.

In Ward v. Byrne, 5 M. & W. 548, a bond conditioned not to follow or be employed in the business of a coal merchant for nine months was held void. So was a covenant not to carry on the business of a brewer, or merchant, or agent for the sale of ale, in S. or elsewhere, or in any other manner soever be concerned in the said business during a term of ten years, in Hinde v. Gray, 1 M. & Gr. 195, 1 Scott, N. R. 123, S. C. But perhaps that might now be considered a valid covenant so far as it related to S., though void as to the rest; Price v. Green, 16 M. & W. 396. [Where the condition of a bond given by an agent to his employers was that he would faithfully serve them, and not do business in their trade within ten miles of T. for himself, or any other person or firm, the restraint was held to be only "durante servitio." King v. Hansell, 5 H. & N. 106; Carnes v. Nisbett, 31 L. J. Exch. 273.

As to the effect of partiality or universality in respect of *time* in the case of restraints, otherwise bad or good, with regard to *space*, see the observation of Parke, B., in *Ward* v. *Byrne*, 5 M. & W. 548; of Byles, J., in *Mumford* v. *Gething*, 7 C. B., N. S. 317; *Whittaker* v. *Howe*, 3 Beav. 383; and *Jones* v. *Dees*, 1 H. & N. 189.]

Where the restraint is partial in respect of space, [it was once thought that] the proper way of measuring the distance is to take the nearest mode of access to the point whence it is to be reckoned. Leigh v. Hind, 9 B. & C. 774, 4 M. & R. 597; Atkins v. Kinnier, 4 Exch. 776 [but in Leigh v. Hind, Baron Parke thought the measurement should be in a straight line from point to point; and in that case the question was not whether the measurement should be in a straight line, or by the nearest way of access, but whether it should be by the nearest or by the usual mode of access. In Atkins v. Kinnear, the deed expressly prescribed how the measurement should be made, namely, "measuring by the usual streets or ways of approach," which words were held to mean, not by the most frequented public ways, but by any of the usual public ways. These cases, therefore, are not authorities against the view that where the agreement is silent as to the mode of ascertaining the distance, the measurement should be in a straight line; and this view was acted upon in the case of Duignan v. Walker, 1 Johns. 446; and has been finally adopted in Mouflet v. Cole, L. R. 7 Ex. 70, 8 Exch. 32. For analogous cases, see R v. Saffron Walden, 9 Q. B. 76; Lake v. Butler, 5 E. & B. 92; Jewel v. Stead, 6 E. & B. 350; Stokes v. Grissell, 14 C. B. 678.]

Upon the second point, namely, the adequacy of the consideration, some confusion, rather verbal than substantial, had at one time crept into the judgments, thus it was held in Young v. Timmins, 1 Tyrwh. 226, that where Ireland bound himself to work exclusively for certain persons for his and their lives, they not undertaking to find him full employ, but on the contrary, reserving to themselves liberty to employ others, the contract was roid for want of adequacy of consideration though it contained a proviso, under which Ireland was allowed to take and execute the orders of persons residing in London or within six miles thereof. "If I could find," said Bayley, B., "any obligation on the defendants to find the bankrupt a supply of work sufficient to keep him and his workmen in an adequate and regular course of employ, that might be a good consideration for the restraint he thus imposes on himself." (Accord. Wallis v. Day, 2 M. & W. 273; Pilkington v. Scott, 15 M. & W. 657 [but compare Catt v. Tourle, L. R. 4 Ch. 654].) "But if no such thing exists, but, on the contrary, I find it possible that no employ might, for a considerable time, be given to him, then there is no adequate consideration." "The restraint on one side meant to be enforced," said Lord Ellenborough, in Gale v. Reed, 8 East, 86, "should in reason be coextensive only with the benefits meant to be enjoyed on the other."

In the case of Hitchcock v. Coker, in the Exchequer Chamber, in error from Q. B. 6 A. & E. 439, it was contended that the court could not inquire into the adequacy of the consideration when once shown to possess some bona fide legal value. That case perhaps turned less on adequacy than reasonableness. In the course of the argument, Alderson, B., observed, that "if the consideration were so small as to be colorable, the agreement would be bad." In Leighton v. Wales, 3 M. & W. 551, Parke, B., is reported to have said, that "it is clear since the case of Hitchcock v. Coker, that the court cannot inquire into the extent or adequacy of the consideration:" and in Archer v. Marsh, 6 A. & E. 966, the judgment in which was delayed to await the decision of Hitchcock v. Coker, the Queen's Bench finally pronounced that case to have decided that the parties must act on their own view as to the adequacy of the compensation. And again in Pilkington v. Scott, 15 M. & W. 657 (where the contract was not under seal) the same doctrine was emphatically repeated, and the law then stated by Alderson, B., may now be considered settled, viz., "that if it be an unreasonable restraint of trade, it is void altogether; but if not, it is lawful; the only question being whether there is a consideration to support it, and the adequacy of the consideration the court will not inquire into, but will leave the parties to make the

bargain for themselves. Before the case of *Hitchcock* v. *Coker*, a notion prevailed that the consideration must be adequate to the restraint; that was intruth the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain." [And see *Gravely* v. *Barnard*, L. R. 10 Eq. 518; 43 L. J. Ch. 659.]

If there be objected to this view an inconsistency with the decisions that to create a valid restraint of trade some consideration is necessary, even in the case of a contract under seal, Hutton v. Parker, 7 Dowl. 739 (which, in general, wants no consideration, Cooch v. Goodman, 2 Q. B. 580; see Pitman v. Woodbury, 3 Exch. 4; Swatman v. Ambler, 8 Exch. 72; Morgan v. Pike, 14 ('. B. 473), the answer is easy; it is this, that consideration is here required for a different reason from that whereon the ordinary law of contracts without consideration rests, the reason being that it would be unreasonable for a man to enter into such a stipulation without some consideration, though it must be left to his sense of his own interest to determine what should be the amount or nature of that consideration. And this appears to have been the view taken by Parke, B., in Wallis v. Day, 2 M. & W. 277, and by the Court of Exchequer, in Mallan v. May, 11 M. & W. 665, where Parke, B., in delivering judgment, recognized the proposition of Tindal, C. J., in Horner v. Graves, 7 Bing. 744, that "contracts in restraint of trade are, in themselves, if nothing shows them to be reasonable, bad in the eye of the law;" and proceeded to add, that "therefore, if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments showing circumstances which rendered such a contract reasonable, the instrument is void." And it seems not improbable, now that the doctrine of adequacy of consideration is overturned by Hitchcock v. Coker, and Archer v. Marsh, that several of the contracts, which formerly would have been open to the objection of inadequacy of consideration, may be held upon the same grounds obnoxious to that of unreasonableness; for instance, the contract in Young v. Timmins might possibly be held an unreasonable one, and the decision sustained on that ground. In the case of a contract under seal, if the above observations be correct, it may be thought to follow that any consideration on which a man might reasonably act, though not sufficient to sustain a promise not under seal, ought to be held to satisfy the rule acted on in Hutton v. Parker, provided always that the deed be not open to either of the other objections mentioned in the note. But the decisions, it must be admitted, do not expressly warrant that conclusion, and it is so hard to conceive of a reasonable contract of this nature, without some consideration, that the precise question seems unlikely to arise. In Sainter v. Ferguson, 7 C. B. 716, the engagement by the defendant, a surgeon at M., of the plaintiff as his assistant, though the term and conditions of the engagement were not shown, was held to be a sufficient consideration for a promise not at any time to practise at M., or within seven miles of it.

Lastly, it is not sufficient that the restraint should be partial, and founded upon consideration. The agreement must be reasonable. "We do not see" (says Tindal, C. J., in Horner v. Graves, 7 Bing. 743) "how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy."

[(See Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345.)] "No certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond which excessive. In Davis v. Mason, 5 T. R. 118, where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable; and in one of the cases, 150 miles was considered as not an unreasonable distance, where an attorney had bought the business of another who had retired from his profession. But it is obvious that the business of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence or by agents. And unless the case were such that the restraint was plainly and obviously unnecessary, the court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are, if nothing more appears to show them reasonable, bad in the eye of the law."

In Horner v. Graves, an agreement that the defendant, a surgeon-dentist, would abstain from practising within 100 miles of York, was held void, on the ground that the distance rendered it unreasonable. [In the case of a horsehair manufacturer, 200 miles was considered not to be too long a distance; Harms v. Parsons, 32 Beav. 328; 32 L. J. Cha. 247.] Instances in which the distance has been held not too large, and the contract consequently reasonable, may be found in Chesman v. Nainby, Clerk v. Comer, Davis v. Mason, Bunn v. Guy, and Whittaker v. Howe, above cited. See also Leighton v. Wales, 3 M. & W. 545. [In Jones v. Lees, 1 H. & N. 189, a patentee of improvements in stubbing-machines bound the defendant, by deed, to use the patent during the term for which it was granted, the latter covenanting not to make or vend any such machines during that term without applying the invention to them. This restraint, which was partial with regard to the mode of exercising the trade, but total in respect of space, was held to be reasonable; and judgment was given for the plaintiff on demurrer to a plea to a count on the covenant, which alleged that the invention was worthless, and that the machines were rendered unsalable by applying it to them. See Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345; 39 L. J. Ch. 86. Secus where the restriction was total as to space, and also greater than was required for the protection of the imposing party, Allsopp v. Wheatcroft, L. R. 15 Eq. 59; 42 L. J. Ch. 12. In Rousillon v. Rousillon, 14 Ch. D. 351, Fry, J., after reviewing the authorities, refused to follow those which lay down as an absolute rule that a restriction total as to space is void, considering that the true question in each case is whether the restraint is greater than is required for the reasonable protection of the covenantee: and see Davies v. Davies, March 14, 1887, Kekewich, J.]

In Hitchcock v. Coker, 6 A. & E. 439, where A. in consideration of B. employing him as his assistant at a salary, in the business of a chemist, agreed not to carry on business within three miles of T., it was urged that this was unreasonable, because not limited to B.'s life or continuance in trade. But held good, for per Tindal, C. J., "it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee or executor. And the only effectual mode of doing so appeared to be by making the restriction of the servant's setting up the trade within the given limit co-extensive with the servant's life." In Hastings v. Whittey, 2 Exch. 611, a bond conditioned for payment if the obligor should at any time after, &c., practise at S. "without the consent in writing of the obligee," was held not to be limited to the lifetime of the obligee. See Archer v. Marsh, 6 A. & E. 966, and Ward v. Byrne, 5 M. & W. 548, where a condition not to follow or be employed in the business of a coal-

merchant for nine months was held unreasonable. [See also Sainter v. Ferguson, 7 C. B. 716, and Mumford v. Gething, 7 C. B. N. S. 305 and 316, note (a).]

In the cases of Mallan v. May, 11 M. & W. 653; 13 M. & W. 511; Green v. Price, 13 M. & W. 695; Price v. Green, 16 M. & W. 346 and Mumford v. Gething, supra], but more especially in the highly instructive judgment of the Court of Exchequer in Mallan v. May, the doctrine of the principal case was much discussed and fully confirmed. In Mallan v. May, 11 M. & W. 653, the agreement was one by which the defendant was to become assistant to the plaintiffs in their business of dentist for four years; the plaintiffs were to instruct him in the business; and the defendant covenanted not, after the expiration of the term, to carry on the same business in London or in any of the towns or places in England or Scotland where the plaintiffs or the defendant on their account might have been practising before the expiration of the service. Parke. B., in delivering the judgment of the court, pointed out that contracts for the partial restraint of trade are in fact, in many cases, beneficial to the public; and he instanced the case of a tradesman selling his shop with a contract not to carry on the trade in the same place, which is in effect the sale of a goodwill, "and offers an encouragement to trade by allowing a party to dispose of all the fruits of his industry," and also that of a manufacturer or professional man taking an assistant into his service, with a stipulation that he shall not carry on the same business within certain limits. "In such a case," said his lordship, "the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction on the secrets of his trade and the communication of his own skill and experience from the fear of his afterwards having a rival in the same business." And the covenant was, in that case, adjudged to be divisible, and to be not an unreasonable restriction so far as it related to not practising in London, though it was stated on the record that London had more than a million of inhabitants; and the court doubted the propriety of taking the comparative populousness of particular districts, the number of men of the same profession, the habits of the people in the neighborhood, or other like matter of a fluctuating and uncertain character into consideration, and expressed an opinion, "that it would be better to lay down such a limit as under any circumstances would be sufficient protection to the interest of the contracting party, and if the limit stipulated for did not exceed that, to pronounce the contract to be valid." On the other hand, the rest of the covenant, relating to not practising in any of the towns or places in England or Scotland where the plaintiff or the defendant on their account might have been practising before the expiration of the service, was holden unreasonable and void, as going beyond what the protection of the plaintiff's interests could reasonably require, and putting into their hands the power of preventing the defendant from practising anywhere.

[The above passage, from Baron Parke's judgment in Mullan v. May, was cited by Erle, C. J., in Mumford v. Gething, 7 C. B. N. S. 305, who there said: "I think that contracts in partial restraint of trade are beneficial to the public, as well as to the immediate parties; for if the law discouraged such agreements as these, employers would be extremely scrupulous as to engaging servants in a confidential capacity; seeing that they would incur the risk of their taking advantage of the knowledge they acquired of their customers, and their mode of conducting business, and then transferring their services to a rival trader. It appears to me highly important that persons like this defendant" (a commercial traveller) "should be able to enter into contracts of this sort, which afford

some security to their employers that the knowledge acquired in their service will not be used to their prejudice."]

In Green v. Price, 13 M. & W. 695, a perfumer sold to his co-partner his share of the business of the firm, and covenanted not to carry on the same business in the cities of London and Westminster, or within 600 miles from the same respectively, binding himself to performance in a sum of 5000l. by way of liquidated damages, and not of penalty. The Court of Exchequer, acting upon the authority of Mallan v. May, held the covenant valid as to practising in London and Westminster, and merely roid as to the residue, and the defendant being shown to have practised in London, judgment was given for the plaintiff for the whole amount of the 5000l., which judgment was affirmed in the Exchequer Chamber; Price v. Green, 16 M. & W. 346; and see Nicholls v. Stretton, 10 Q. B. 346. In Tallis v. Tallis, 1 E. & B. 391, the rule was acted upon, that such a covenant is valid, unless it plainly appears that a restriction is imposed by it beyond what the interest of the plaintiff requires; and a covenant restraining a partner in the publishing trade from carrying on the business of soliciting purchasers for works of which the copyright had expired published in parts (known as the canvassing trade) within 150 miles of the General Post Office, was upheld, and a plea stating various reasons of expediency, against the validity of the covenant under the peculiar circumstances of the case, was held bad, as not showing plainly that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's publications were excluded. See Avery v. Langford, 1 Kay 663 [Allsopp v. Wheatcroft, L. R. 15 Eq. 59; 42 L. J. Ch. 12.

In the Leather Cloth Co. v. Lorsont, supra, James, V.-C., thus states the law: "All the cases when they come to be examined seem to establish this principle, that all restraints upon trade are bad, as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labor, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has by skill, or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market, and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the court is not unreasonable, having regard to the subject-matter of the contract." In that case, on the sale to the plaintiff's company of certain patent rights and processes of manufacture introduced into this country from America, the vendors agreed neither directly nor indirectly to carry on, nor to the best of their power to allow to be carried on by others in any part of Europe, any company or manufactory having for its object the manufacture or sale of productions then manufactured in the defendant's business; and it was held that this restriction was not greater, having regard to the subject-matter of the contract, than was necessary for the protection of the purchasers.]

It may be worth noticing, that in Mallan v. May, 13 M. & W. 511, the word "London" in the contract was considered to mean the City of London, that being its strict and proper meaning, and there being nothing in the contract to prevent its being so construed. It seems, however, open to explanation in each

case, in what sense the word is used. See *Beckford* v. *Cantwell*, 1 M. & Rob. 187, 5 C. & P. 242, S. C.; *Smith* v. *Smyth*, 10 Bing. 406 [Wallace v. The A.-G., 33 L. J. Ch. 314].

If the contract is reasonable when made, subsequent circumstances, such as the fact of the covenantor ceasing business, so as no longer to want the protection, do not affect its operation, *Elves* v. *Crofts*, 10 C. B. 241 [and *Jones* v. *Lees*, 1 H. & N. 189].

As to what is a breach of a contract not to carry on business in a particular place, see Turner v. Evans, 2 E. & B. 512; 2 De G. M. & G. 740 [Brampton v. Beddoes, 13 C. B. N. S. 538. In Kemp v. Sober, 1 Sim. N. S. 517, 20 L. J. Ch. 602. keeping a girls' school was held a breach of a covenant not to carry on any trade, business, or calling, on the premises; see also Wickenden v. Webster, 6 E. & B. 387; London, &c., Building Co. v. Field, 16 Ch. D. 645, 50 L. J. Ch. 549; Holt v. Collyer, 16 Ch. D. 718, 50 L. J. Ch. 311; Rolls v. Miller, 27 Ch. D. 71, 53 L. J. Ch. 682; Portman v. Home Hospital Association, 27 Ch. D. 81 n. For breaches of other restrictive covenants, see Newling v. Dobell, 38 L. J. Ch. 111; Allen v. Taylor, 39 L. J. 627; Jones v. Heavens, 4 Ch. D. 636; Kemp v. Bond, 5 Ch. D. 549.

As to trade secrets, see Morrison v. Moat, 9 Hare 241.]

Under the same head as contracts in restraint of trade may be classed those by which the services of individuals are secured for a specified time, or for life, to a particular master. There seems to be no objection to such contracts, even when they extend over the whole period of the life of the servant, though in some countries a restraint so extensive has been considered inconsistent with individual liberty, and accordingly forbidden. The question, however, appears to have been long since settled in our law, without regard to considerations which seem to embrace a shadow. See Wallis v. Day, 2 M. & W. 277. And in Pilkington v. Scott, 15 M. & W. 657, and Hartley v. Cummings, 5 C. B. 247, agreements whereby, in substance, workmen engaged to serve, for a term of years, certain persons or their firm and no others, at a certain scale of wages, subject to determine in the event of sickness or incapacity of the men, or cessation of business by the employers, with power to the employers to dismiss the workmen in certain events, or on certain notice, were considered open neither to the objection of want of mutuality, nor of interference with public policy.

Here may be noticed a dictum in Wallis v. Day, 2 M. & W. 281, that according to 15 Viner, 323, Master and Servant, (N.) 5, "in order to maintain an action against a person who contracts to serve for life, the contract must be by deed." However, all that was necessary in Wallis v. Day was to show that such a contract was not illegal, and not that it must be under seal; and on reference to the authority mentioned in the passage from Viner, viz., H. 2 H. 4, fol. 14, pl. 12, the point there really decided will be found to be, that an action of debt on simple contract was not then (as it is now, by 3 and 4 W. 4, c. 42, s. 14, see Barry v. Robinson, 1 N. R. 293) maintainable against executors, and the passage in Viner itself does not relate to the subject of master and servant generally, but to the construction of the statute of laborers: so that the dictum in Wallis v. Day can hardly be considered, what it seemingly was not intended to be, an authority for the proposition that a contract to serve for life must be under seal.

As to the legality of combinations on the part of workmen to raise, or of masters to lower wages, as tending to impede the free course of trade and manufacture, see *Hilton v. Eckersley* [6 E. & B. 47, affirmed in error, *ib.* 66, and the 34 & 35 Vict. c. 31; *Rigby v. Connol*, 14 Ch. D. 482, 49 L. J. Ch. 328; *Wolfe v. Matthews*, 21 Ch. D. 194, 51 L. J. Ch. 833; and *Walshy v. Anley*, 30 L. J. M. C. 121; and compare *Jones v. North*, L. R. 19 Eq. 426; 44 L. J. Ch. 388, in which

an agreement among four quarry owners, that one of their number should not tender for a certain contract, and that two others should tender at a price higher than the fourth, with a view to secure the contract to him, with a stipulation that he should buy stone from each of them at a fixed price, was upheld. As to the effect of rules framed by committees of workmen or masters, see Levey v. Hill, 3 H. & N. 702.]

In Calder and Hebble Navigation v. Pulling, 14 M. & W. 76, a by-law of a canal company directed against Sunday trading and travelling was held void upon the construction of the local act, which, though very general in its terms, was considered not to give the company any power to restrain the traffic on the canal, for the purpose of enforcing the proper observance of religious duties.

On the same reason with bonds and contracts in restraint of trade stand perpetuities; attempts to create which are never permitted by the law to succeed, on account of the tendency of such limitations to paralyze trade, by shackling property, and preventing its free circulation for the purposes of commerce; for trade consists in the free application of labor to the free circulation of property, and any restraint laid upon the one would be as injurious to its interests as if imposed upon the other.

This doctrine of perpetuities, as it is called, is of comparatively modern introduction. Its objects were, indeed, at a very ancient period of English law, in some degree accomplished by a maxim which is recognized by our earliest writers, viz. that property has certain inseparable incidents, among which is the right of aliening it by the assurances appropriated by the law to that purpose, of which incidents it cannot be deprived by any private disposition. One of the earliest cases in which this doctrine was maintained is reported by Littleton, sect. 720, who tells us that "a certain Justice of the Common Pleas dwelling in Kent, called Richel, had issue divers sons, and his intent was that his eldest son should have certain lands and tenements to him and the heirs of his body begotten, and, for default of issue, the remainder to the second son, &c., and so to the third son, &c.; and because he would that none of his sons should alien or make warrantie to bar or hurt the others that should be in the remainder, &c., he causeth an indenture to me made to this effect, viz., that the lands and tenements were given to his eldest son, upon such condition, that if the eldest son alien in fee, or in fee tail, &c., or if any of the sons alien, &c., that then their estate should cease, and be void, and that then the same lands and tenements immediately should remain to the second son, and the heirs of his body begotten, et sic ultra, the remainder to his other sons; and livery of seisin was made accordingly." This device, however, was held void; and Mr. Butler remarks, in a learned note to Co. Litt. 379, b., the perusal of which is strongly recommended to readers desirous of pursuing this subject, that "this was one of the many attempts which have been made to restrain that right of alienation which is inseparable from the estate of a tenant in tail. The chief of them are stated in a very pointed manner by Mr. Knowler, 1 Burr. 84."

Upon the same principle, viz., that property cannot by any private disposition be robbed of its incidents, of which the power of alienation is one, proceeds the case put by Littleton, at sect. 360, viz.: "Also if a feoffment be made on this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements, he hath power to alien them to any person, by the law. For, if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason; and therefore such a condition is void." On which Lord Coke observes that "The like law is of a devise in fee on condition that the devisee shall not alien; the condition is void, and so it is of a grant, release,

confirmation, or any other conveyance, whereby a fee simple doth pass: for it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien; and so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest and property therein, upon condition that the donee or vendee shall not alien the same, the same is void; because his whole interest and property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic, and bargaining and contracting between man and man." [See Shepherd's Touchstone, 131; Co. Litt. 223 a; Rosher v. Rosher, 26 Ch. D. 801, 53 L. J. Ch. 722.]

On this doctrine, viz., that property cannot be deprived of the power of alienation legally incident to it, by any private disposition, equity has engrafted one exception, by allowing married women to be restrained from aliening, by way of anticipation, property limited to their sole and separate use during the coverture. The precise extent to which this equitable doctrine may be carried was long in incerto, and this uncertainty has given rise to a great deal of interesting discussion, a full account of which will be found in a very clearly and ably written pamphlet published by Mr. Hayes, upon that subject. See now Tullett v. Armstrong, before the L. C., an account of which in its earlier stages will be found in the last edition of Hayes on Conveyancing. By the judgment in that case, and in Scarborough v. Borman, both reported 4 Myl. & Cr. 377, the doctrine of equity respecting property given to the separate use of a woman, with a prohibition against anticipation, has been definitely settled upon reasoning which applies equally where the property is a fee or less estate, realty or personalty; see Bagget v. Meux, 1 Phil. 627 [Goulder v. Cann, 5 Jur. N. S. 1196]. The result of the above cases is, that where property of any kind is given or settled to the separate use of a woman for any estate, and she is prohibited against anticipating it, she will, although discovert when the gift or settlement takes effect, be effectually prevented from anticipating the property during any subsequent coverture to which she may become subject. Also, see Brown v. Bamford, 1 Phil. 620 [Peillon v. Brooking, 25 Beav. 218; Wheelwright v. Wheelwright, 2 Jur. N. S. 554; Draycott v. Harrison, 17 Q. B. D. 147. No particular form of words is required to impose a prohibition against anticipation, Baker v. Bradley, 7 De G. M. & G. 597; and see notes to Hulme v. Tenant, White & Tudor's L. C. in Equity, vol. i.].

To return to the head of perpetuities. It was in time found that the interests of commerce were by no means sufficiently guarded by the assertion of the maxim, that property could not be robbed of the quality of transferability; for it would have been easy to limit particular estates in such a manner as to postpone the actual enjoyment of the fee so long as to create what would have been virtually, though not nominally, a strict entail; had not the courts, proceeding on the maxim of law, quodeunque prohibetur fieri ex directo prohibetur et per obliquum, established, as an inflexible rule, "that though an estate may be rendered inalienable during the existence of a life, or of any number of lives, in being, and twenty-one years after; Cadell v. Palmer, 10 Bing. 140; or possibly even for nine months beyond the twenty-one years, in case the person ultimately entitled to the estate should be an infant in ventre sa mère at the time of its accruing to him, yet, that all attempts to postpone the enjoyment of the fee for a longer period are void;" and therefore in the famous case of Spencer v. Duke of Marlborough, 5 Bro. P. C. 592, Eden 404, where John Duke of Marlborough devised to trustees and their heirs, to the use of his daughter for life, remainder to Lord Ryalton for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Lord Ryalton in tail male, re-

mainder to Lord Robert Spencer for life, remainder to trustees to preserve contingent remainders, &c., remainder to Charles Spencer in the same manner, and inserted a clause empowering his trustees, on the birth of each son of Lord Ryalton, Lord Robert and Charles Spencer, to revoke and make void the respective uses limited to their respective sons in tail male, and in lieu thereof to limit the premises to the use of such sons for their lives with immediate remainder to the respective sons of such sons severally and respectively in tail male, Lord Northington declared the clause void, as tending to a perpetuity; and on appeal to the Lords, the judges were unanimously of the same opinion. See Crusie's Digest, title 32, c. 23; Beard v. Westcott, 5 B. & A. 801; Cadell v. Palmer, ubi supra; and Mr. Butler's note, Co. Litt. 379 b. [See also Harding v. Nott, 7 E. & B. 650; Lewis on The Law of Perpetuity; 1 Jarman on Wills, 4th ed. 250; and Keppel v. Bailey, 2 Mylne & K. 517. In Gilbertson v. Richards, 4 H. &. N. 277; affirmed 5 H. & N. 453; 29 L. J. Exch. 213; where in a mortgage in fee, with a power of sale on default, and covenants for quiet enjoyment until default, a proviso that on entry for default the land should be charged with a rent-charge payable to the mortgagor and his assigns was held to be valid, the Exch. Ch. doubted whether the rule as to perpetuities applied where the party who is, or whose heirs are, to take, and who can dispose of, release, or alienate the estate, is ascertained, but did not decide the case upon this point. In accordance with this expression of opinion, and with the decision of the Court of Exchequer in the same case, Fry, J., held to be valid a covenant to give an unlimited right of preëmption of land, on the ground that the covenantor and covenantee together could at any time alienate the land absolutely. Birmingham Canal Co. v. Cartwright, 11 Ch. D. 421.]

Lord Coke has laid it down, 1 Inst. 206, that "if a feoffee be bound in a bond that the feoffee and his heirs shall not alien, this is good, for he may notwith-standing alien, if he will forfeit his bond that he himself hath made." And in Freeman v. Freeman, 2 Vern. 233, a father settled lands on his son in tail, and took a bond from him that he would not dock the entail. On a bill to be relieved against this bond, the court held it good, because, if the son had not agreed to give his bond, the father might have made him only tenant for life.

It seems, however, that the above opinion of Lord Coke cannot be supported; for, if a general restraint on alienation be, as it unquestionably is, contrary to public policy, there is no more reason for supporting a bond made to enforce it, than for supporting a bond in general restraint of trade. And in case where A., having limited lands to B. in tail, took a bond from him not to commit waste, it was decreed to be delivered up to be cancelled, the court saying that it was an idle bond. Jerris v. Bruton, 2 Vern. 251. So, where an elder brother enfeoffed his second brother in tail, remainder to a younger brother in the like manner, and made each of them enter into a statute with the other that he would not alien; because these statutes were in substance to make a perpetuity, they were ordered to be cancelled by the Court of Chancery, with the advice of Lord Coke himself. Poole's Case, Moore, 810.

It only remains to remark, that trusts for accumulation, which, being thought to partake of the objectionable nature of perpetuities, were formerly bounded by the same limits (see Thellusson v. Woodford, 4 Ves. jun. 227 [Williams v. Lewis, 6 H. of Lords' Cases, 1013; Lord Rendlesham v. Robarts, 23 Beav. 321]), are now regulated by a statute of their own, 39 & 40 G. 3, c. 98, which enacts that no person, after the passing of that act (28th July, 1800), shall, by any deed or will, "settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially

accumulated for any longer term than for the life or lives of any such grantor or grantors, settlor or settlors, or the term of 21 years from the death of any such grantor or grantors, settlor or testator, or during the minority or respective minorities of any person or persons who shall be living or in ventre sa mère at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will, or other assurance directing such accumulations, would, for the time being, if of full age, be entitled to the rents, issues, profits, and produce of such property so directed to be accumulated. And in every case where any accumulation shall be directed otherwise than as aforesaid, such directions shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to accumulate contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed.

"Provided always, that nothing in that act contained should extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or any provision for raising portions for any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of any timber or wood upon any lands or tenements, but that all such provisions and directions may and shall be made and given as if that act had not passed." See on the construction of this statute, Griffiths v. Vere, 9 Ves. jun. 127; Longden v. Simson, 12 Ves. 295; Southampton v. Hertford, 2 V. & B. 54; Marshall v. Holloway, 2 Swanst. 423; Haley v. Bannister, 4 Madd. 275; Shaw v. Rhodes, 1 Myl. & Cr. 135. S. C. on appeal, 5 Cl. & F. 114 nom. Evans v. Hellier; Green v. Gascoyne, 34 L. J. Ch. 268; Matthews v. Keble, L. R. 4 Eq. 467; 3 Ch. 691; Jagger v. Jagger, 25 Ch. D. 729; 53 L. J. Ch. 201.]

An agreement in general restraint both as to time and space is void, although the consideration is good. — Thus an agreement between citizens of Massachusetts never to set up, exercise, or carry on the trade of manufacturing and selling shoe-cutters at any place within that commonwealth was held to be illegal; Taylor v. Blanchard, 13 Allen 370; see Whitney v. Stoyton, 40 Me. 224; Nobles v. Bates, 7 Cow. 307; Gompers v. Rochester, 50 Penn. St. 382; Croft v. Conoughy, 79 Ill. 346; Jenkins v. Temples, 39 Ga. 655; Callahan v. Donelly, 4 Cal. 152; Keller v. Taylor, 53 Penn. St. 467.

In Dixon v. United States, 1 Brock. 181, Ch. J. Marshall, commenting on the objection that the bond in the case was void, says, "The rule relied on is founded on the principle that the obligation is hostile to the policy of the law, that it surrenders legal rights the exercise of which are conducive to the general interest. A contract not to sell more of the ven-

dor's adjacent land held void; Brenner v. Marshall, 4 C. E. Greene 537.

A bond that the obligor shall never carry on the business of founding iron is void; Alger v. Thacher, 19 Pick. 51.

In this case Morton, J., thus states the law of this class of cases, as universally adopted in this country. "Contracts in restraint of trade generally have been held to be void; while those limited as to time, or place, or persons, have been regarded as valid." And he assigns as reasons for the rule:

- 1. That such contracts injure the parties making them, by diminishing their means of procuring livelihoods.
- 2. They tend to deprive the public of the services of men in vocations for which they may be best fitted.
- 3. They discourage industry and enterprise, and diminish the products of ingenuity and skill.
 - 4. They prevent competition and enhance prices.
- 5. They expose the public to the evils of monopoly. See Central Ohio Salt Co. v. Guthrie, 35 Ohio 666.

An agreement between carriers and transportation companies to destroy all competition and impose on the community arbitrary and unreasonable prices held void as against public policy; Oregon St. R. Co. v. Winsor, 20 Wall. 64; Hooker v. Vandewater, 4 Denio 349, 5 Denio 434; Maguire v. Smock, 42 Ind. 1; Wells v. Oregon R. R., 18 Fed. Rep. 518; State v. Hartford & N. H. R. Co., 29 Conn. 538.

In this last case an agreement intended to affect injuriously the facilities for public travel over a route of railroad which had been or might be authorized by law was held void. See Denver R. R. v. Atchison, Topeka & Sante Fe R. R., 15 Fed. Rep. 650, and note p. 667; Western Union Tel. Co. v. Burlington & S. W. R. Co., 3 McCrary 130.

In the case of Dame v. Fuller, 18 Pick. 472, an agreement respecting the locating of depot on the line of a railroad was held invalid as contrary to public policy, to open, upright, and fair dealing, because it tended injuriously to affect the public interest in having the fittest location of the depot, and the interest of the two corporations; see Louisville, &c., R. R. Co. v. Sumner, 106 Ind. 55.

It is not competent for a railroad company to grant to a telegraph company the exclusive right to establish lines of telegraph along its right of way—such being against public policy; Western Union Tel. Co. v. B. & S. W. R. R. Co., 11 Fed. Rep. 1 & 549; Western Union Tel. Co. v. B. & Ohio Tel. Co., 23 Fed. Rep. 12. See 65 Ga. 160; B. & Ohio Tel. Co. v. Western Union Tel. Co., 24 Fed. Rep. 319; West Virginia Trans. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600.

An agreement was entered into by several commercial firms, by which they bound themselves, for the term of three months, not to sell any India cotton bagging, except with the consent of a majority of them. *Held* void as a combination to enhance the price; India Association v. Kock, 14 La. Ann. 164; Albany Exch. Bank v. Allen, 5 Denio 434.

The same rule of law that vitiates the above named contracts makes an agreement not to bid against each other at a sale on execution void; Platt v. Oliver, 2 McLean 267; S. C., 1 McLean 295. See Chappel v. Brockway, 21 Wend. 157.

Contracts in partial restraint of trade not void for that reason.—Angier v. Webber, 14 Allen 211; Pierce v. Fuller, 8 Mass. 223; Perkins v. Clay, 54 N. H. 518; Perkins v. Lyman, 9 Mass. 522; Palmer v. Stebbins, 3 Pick. 188; Vickory v. Welch, 19 Pick. 523.

An agreement not to engage in the business of a grocer within prescribed limits in the city of Boston held valid. So a contract to discontinue keeping hotel on an adjoining lot; Hirchew v. Hamilton, 3 Greene Rep. 596; Pierce v. Woodward, 6 Pick. 206. See Stewart v. Challacombe, 11 Ill. App. 257.

So the contract of a physician for the sale of his "practice and good-will" in a specified town. And in such a contract there is an implied covenant that the vendor will not interfere with the enjoyment of what he has sold; Haldeman v. Simonton, 55 Iowa 144; Dwight v. Hamilton, 113 Mass. 175; Butler v. Barlison, 16 Vt. 176.

So of a contract between bakers; Boutelle c. Smith, 116 Mass. 111.

A covenant made by a patentee of a process of manufacture in a business not local not necessarily void; Morse Twist Drill & Machine Co. v. Morse, 103 Mass. 73.

A contract not to engage in the practice of law at a particular place is valid, 52 Iowa 241. See Haldeman v. Simonton, 55 Iowa 144; 67 Id. 341; Smalley v. Greene, 52 Iowa 241.

A contract not to carry on a certain business in one county of a State, although unlimited as to time, held valid; Dean v.

Emerson, 102 Mass. 480. See Hedge v. Lowe, 47 Iowa 137; Guerond v. Daudelet, 32 Md. 561, 33 Md. 63; Richardson v. Peacock, 33 N. J. Eq. 597. One covenant in a contract in restraint of trade may be valid and another independent covenant in the same contract be valid; Jarvis v. Peck, 1 Hopk. Ch. Rep. 479. A bond that the obligor would not exercise a trade is void; but if the inhibition is only for a limited time and space it may be good; Whitney v. Stoyton, 40 Me. 224; Caswell v. Johnson, 58 Me. 164. See Warren v. Jones, 51 Me. 146; Smith v. Gibbs, 44 N. H. 334. A., a dentist, agreed to keep himself supplied with mineral teeth by purchases from B. in consideration that B. would sell to no other person in the place, held valid; Clark v. Crosby, 37 Vt. 188. A contract between two rival manufacturers fixing a scale of prices and becoming partners for a specified time held not void, provided the goods manufactured were not articles of necessity and the transaction was not a conspiracy between the parties to control prices by creating a monopoly; Dolph v. Troy Laundry Machinery Co., 28 Fed. Rep. 553. Contracts to labor for particular persons exclusively held to be valid; McCaull v. Benham, 16 Fed. Rep. 37; Barnes v. McAllister, 18 How. Pr. 534; 29 Id. 382; 46 Id. 389. An agreement among workmen to protect themselves against the encroachments of their employers, and not to teach others their trade unless by consent of the association, is a valid agreement; Snow v. Wheeler, 113 Mass. 179. See Dolph v. Troy Laundry Machine Co., 28 Fed. 553. A contract not to run boats on a certain line valid where a consideration is proved therefor; California Steam Nav. Co. v. Wright, 6 Cal. 258. In Holmes v. Martin, 9 Ga. 503, it was held that a contract in partial restraint of trade may be supported, provided the restraint be reasonable and the contract be founded on good consideration. See Grasselli v. Lowden, 11 Ohio 349; Verges v. Forshee, 9 La. Ann. 294; 3 La. Ann. 15; Kinsman v. Parkhurst, 18 How. 289; Beard v. Dennis, 6 Md. 200; Billings v. Ames, 32 Mo. 265; Launbenheimer v. Mann, 17 Wisc. 559. A contract not to sell a slave out of the county was held valid; Turner v. Jackson, 7 Dana (Ky.) 435. See Pyke v. Thomas, 5 Bibb. 486. N. sold his newspaper to W. and gave a bond that for the period of eight years he would not connect himself with or lend his name or write for any other paper than W.'s in the cities of New York and Albany, or within eighty miles of New

York. Held, this bond was valid. And that the consideration named in the bond should be deemed adequate until the contrary appeared; Webb v. Noah, 1 Edw. (N. Y.) 604. A contract in restraint of the right of making and selling fanning mills south of the Wabash River, within thirty miles of Marion, in Grant County, is not void on account of the extent of space to which it extends or because the restriction is indefinite in point of time; Bowser v. Bliss, 7 Blackf. (Ind.) 344. In the case of Chappel v. Brockway, 21 Wend. 157, it was intimated that it was not enough that the consideration would be sufficient to uphold a contract in which the public have no interest. This is not the English rule on this subject. See Van Martin v. Babock, 15 M. & W. 660; 6 A. & E. 440. Whether the restraint as to space is reasonable is a question of law, to be decided in view of the circumstances of each case; Gilman v. Dwight, 13 Gray 356; Treat v. Melodeon Co., 35 Conn. 543; Grasselli v. Lowden, 11 Ohio 349; Linn v. Sigsbee, 67 Ill. 75; and Perkins v. Clay, Taylor v. Blanchard, Hedge v. Lowe, ubi supra. The prohibition which extends any further than will fully protect the party for whose benefit the contract is made, in his occupation or business, is an unreasonable restraint of trade and will render the contract void; Long v. Towl, 42 Mo. 545; Arnold v. Kreutzer, 67 Iowa 214. A contract not to exercise the trade of making printers' rollers and composition in New York City or within two hundred and fifty miles of the city held void; Bingham v. Maigne, 52 N. Y. Super. Ct. 90; Diamond Match Co. v. Roeber, 35 Hun. 421. An agreement not to engage in a particular business in a town named, so long as the person to whom the business was sold should carry it on there, held valid; Gill v. Ferris, 82 Mo. 156. See Wiley v. Baumgardner, 97 Md. 66; Johnson v. Gwinn, 100 Md. 466. An agreement not to practise as a physician in a certain city "and vicinity" held valid; Timmerman v. Dever, 52 Mich. 34. An agreement not to practise dentistry "within ten miles of Litchfield" held to be valid; Cook v. Johnson, 47 Conn. 175. An agreement in restraint of trade as to time, persons, and locality not necessarily void. The controlling test is the question of monopoly and consequent injury to the public; Skrainka v. Schavringhausen, 8 Mo. App. 522. See Peterson v. Christensen, 26 Minn. 377.

SIMPSON v. HARTOPP.

MICH. 18 GEO. 2. - C. B.

[REPORTED WILLES, 512.]

Implements of trade are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises.

But if they be not in actual use, and if there be no other sufficient distress on the premises, then they may be distrained for rent.

The opinion of the court was delivered, as follows, by Willes, Lord Chief Justice. Trover. This comes before the court on a special verdict found at the Leicester assizes, held at Leicester, on the 3d of August, 1743.

The plaintiff declared against the defendant, for that on the 20th of October, 1741, he was possessed of one frame for the knitting, weaving, and making of stockings, value 20l., as of his own proper goods, and being so possessed, he lost the same, and that afterward, to wit, on the 18th of August, 1742, it came to the hands of the defendant, who knowing the same to be the goods of the plaintiff, afterwards, to wit, on the 19th day of the same month of August, converted the same to his own use; damage 30l.

The defendant pleads not guilty; and the jury find that the plaintiff, on the 27th of March, 1741, was possessed of one frame for knitting, weaving, and making stockings, value 8l., as his own proper goods. That upon that day he let the said frame to John Armstrong, at the weekly rent of 9d., and so from week to week, as long as they the said Nathaniel Simpson, the plaintiff, and John Armstrong, should please: by

virtue of which letting, the said John Armstrong was possessed of the said frame, at the said rent, until the time aftermentioned, when the same was seized as a distress for rent by the defendant. That the said John Armstrong is by trade a stocking-weaver, and used the said stocking-frame as an instrument of his trade, and continued the use thereof, and his apprentice was using the said stocking-frame at the time thereinafter mentioned, when the same was seized by the defendant as a distress for rent. That the said John Armstrong held of the defendant a certain messuage and tenement in the parish of Woodhouse and county of Leicester, by virtue of a lease to him the said John Armstrong thereof, granted by the defendant under the yearly rent of 35l. for a term of years not yet expired, and was in the actual possession of the same when the said stocking-frame was distrained for rent by the defendant. That on the 19th of December, 1741, John Armstrong was indebted to the defendant in 53l. for arrears of rent of the said messuage and tenement; and that the said stocking-frame was then upon the said messuage, in the possession of the said John Armstrong, and that there were not goods or chattels by law distrainable for rent in the said messuage without the said stocking-frame sufficient to satisfy the said rent, so in arrear, at the time when the said stocking-frame was seized as a distress for the said rent. That on the said 19th of December the defendant entered in the same messuage and tenement, and then and there seized the said stocking-frame on the said premises as a distress for the said rent so in arrear, as the said John Armstrong's apprentice was then weaving a stocking on the said frame. And that the defendant (though often requested) hath refused to deliver the said stocking-frame to the said plaintiff, and continues to detain the same. The special verdict concludes, as usual, by submitting the matter to the opinion of the court whether the said stocking-frame was by law distrainable for the said arrears of rent or not; and if the court should be of opinion that it was not, they assess the damages of the plaintiff at 81., &c.

Upon this special verdict three questions arise: -

First, Whether a stocking-frame has any privilege at all as being an instrument of trade, or whether it be generally distrainable for rent as other goods are, even though there was sufficient distress besides.

Secondly, Though it may be so far privileged as not to be distrainable if there be other goods sufficient, yet whether or not it may be distrained if there be not sufficient distress besides.

Thirdly, Though it be distrainable either in the one case or the other when it is not in actual use, yet whether or no it has not a particular privilege by being actually in use at the time of the distress, as the present case is.

I shall but touch upon the two first questions, because they are not the present case; but yet it may be proper to consider them a little, to introduce the third, which is the very case now in question.

There are five sorts of things which at common law were not distrainable:

1st. Things annexed to the freehold.

2d. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ.

3d. Cocks or sheaves of corn.

4th. Beasts of the plough and instruments of husbandry.

5th. The instruments of a man's trade or profession.

The first three sorts were absolutely free from distress, and could not be distrained, even though there were no other goods besides.

The two last are only exempt *sub modo*, that is, upon a supposition that there is sufficient distress besides.

Things annexed to the freehold, as furnaces, millstones, chimney-pieces, and the like, cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow.

Things sent or delivered to a person exercising a trade to be carried, wrought, or manufactured in the way of his trade, as a horse in a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are.

Cocks and sheaves of corn were not distrainable before the statute 2 W. & M. c. 5 (which was made in favor of landlords), because they could not be restored again in the same plight and condition that they were before upon a replevin, but must necessarily be damaged by being removed.

Beasts of the plough, &c., were not distrainable in favor of husbandry (which is of so great advantage to the nation), and likewise because a man should not be left quite destitute of getting a living for himself and his family. And the same reasons hold in the case of the instruments of a man's trade or profession.

But these two last are privileged in case there is distress enough besides; otherwise they may be distrained.

These rules are laid down and fully explained in Co. Lit. 47, a., b., and many other books which are there cited; and there are many subsequent cases in which the same doctrine is established, and which I do not mention because I do not know any one case to the contrary.

From what I have said on this head, the second question is likewise answered; for as the stocking-frame in the present case could only be privileged as it was an instrument of trade, we think that it might have been distrained if it had not been actually in use, it being found that there was not sufficient distress besides. These are the words in Carth. 358, in the case of *Vinkinstone* v. *Ebden*, "the very implements of trade may be distrained if no other distress can be taken."

But whether or not this stocking-frame's being actually in use at the time of the distress gives any further privilege, is the third and principal question in the present case. And we are all of opinion that upon this account it could not be distrained for rent, for these two plain reasons:—

1st. Because it could not be restored again upon a replevin in the same plight and condition as it was, but must be damnified in removing, for the weaving of the stocking would at least be stopped, if not quite spoiled, which is the very reason of the case of corn in cocks, &c.

2dly. Whilst it is in the custody of any person, and used by him, it is a breach of the peace to take it. And these are two such plain and strong reasons, that even if it were quite a new case, I should venture to determine it without any authority at all; but I think that there are several cases and authorities which confirm this opinion.

It is expressly said in Co. Lit. 47, a., that a horse whilst a man is riding upon him, or an axe in a man's hand cutting wood, and the like, cannot be distrained for rent. In *Bracton*, and several other old books, there is a distinction made between

catalla otiosa and things which are in use. It was held in P. 14 H. 8, pl. 6, that if a man has two millstones, and only one is in use, and the other lies by not used, it may be distrained for rent. In Read's Case, Cro. Eliz. 594, it was holden that yarn carrying on a man's shoulders to be weighed could not be distrained any more than a net in a man's hand, or a horse on which a man is riding. So in Moor, 214, The Viscountess of Bindon's Case, it is said that if a man be riding on a horse, the horse cannot be distrained, but if he hath another horse, on which he rides sometimes, his spare horse may be distrained.

I could cite many other cases to the same purpose, but I think that these are sufficient to support a point which has so strong a foundation in reason, especially since there is but one case which seems to look the contrary way, which is the case of Webb v. Bell, 1 Sid. 440, where it was holden that two horses and the harness fastened to a cart loaden with corn might be distrained for rent. But in the first place, I am not clear that this case is law; and besides, it is expressly said in that case that a horse upon which a man was riding cannot be distrained for rent; and therefore a quære is made whether if a man had been on the cart the whole had not been privileged, which is sufficient for the present purpose, it being found that the stocking-frame was to be in the actual use of a man at the time when it was distrained.

For these reasons, and upon the strength of these authorities, we are all of opinion that this stocking-frame, the apprentice being actually weaving a stocking upon it at the time when it was distrained, was not distrainable for rent, even though there were no other distress on the premises, and therefore judgment must be for the plaintiff.

This is usually cited as a leading case, whenever a question arises respecting the exemption of property from distress; and deservedly so, for it would be difficult to find a clearer summary of the authorities as they existed at the time when it was decided, than is contained in the judgment of the Lord Chief Justice. "It is," said Buller, J., 4 T. R. 568, "a case of great authority, because it was twice argued at the bar; and Lord Chief Justice Willes took infinite pains to trace with accuracy those things which are privileged from distress."

There are, according to his lordship, five sorts of property privileged from distress for rent by the common law, and to these the judgment in the principal case authorizes us to add a sixth. The list then will stand thus:—

Things absolutely privileged at common law.

- 1. Things annexed to the freehold.
- Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ.
- 3. Cocks and sheaves of corn, and other things which cannot be restored in the same plight.
 - 4. Things in actual use.

With respect to the first class, viz., fixtures. It was always held for clear law, that they were not distrainable, for the reason stated by the Chief Justice; see 4 T. R. 567 [Darby v. Harris, 1 Q. B. 895; Gilbert on Distresses, 34 and 48; Hellawell v. Eastwood, 6 Exch. 311]; and there is a distinction in this respect between a distress and an execution; for, under the latter, fixtures, which would be removable by the defendant, as between him and his lessor, may be seized; Poole's Case, 1 Salk. 368. See 3 Atk. 13, 3 B. & C. 368; Place v. Fagg, 4 M. & R. 277; and so may growing corn, Ib., though neither the tenant's fixtures nor the growing corn would at common law have been distrainable, Darby v. Harris, supra; Dalton v. Whitten, 3 Q. B. 961. However, as respects the growing corn, the law is now altered by st. 11 G. 2, c. 19, s. 8, which enacts that landlords or their bailiffs, or other persons empowered by them, may distrain corn, grass, or other product growing on any part of the land demised. The words other product have been explained to apply only to other products of a nature similar to the things specified, that is to say, product to which the process of ripening, and being cut, gathered, made, and laid up when ripe, is incidental. Therefore, trees or shrubs growing in a nursery ground are not distrainable under this statute. Clark v. Gaskarth, 8 Taunt. 431. See, too, the further qualifications introduced by 56 G. 3, c. 50, s. 6; and see Wright v. Dewes, 1 A. & E. 641; and 1 M. & W. 448. In a case in the Court of Exchequer, where A. T. had granted to B. H. an annuity, charged on certain premises, and empowered him to distrain for the arrears, and "to detain, manage, sell, and dispose of the distresses in the same manner, in all respects, as distresses for rents reserved upon leases for years, and as if the said annuity was a rent reserved upon a lease for years," the court thought that these words did not empower the grantee to distrain growing crops, but only conferred upon him the powers given to landlords by st. 2 W. & M. cap. 5. See Miller v. Green, 2 Tyrwh. 1, 2 C. & J. 143, 8 Bing. 92; and Johnson v. Faulkner, 2 Q. B. 923.

Machinery fixed to the freehold, not for the improvement or profitable use of the land, but only for the purpose of being more conveniently used as machinery; for instance, a mule used for spinning cotton, though sunk into a stone floor, and secured by molten lead, retains its chattel character, and may be distrained for rent. Hellawell v. Eastwood, 6 Exch. 295 [recognized in Waterfall v. Penistone, 6 E. & B. 876; and distinguished in Walmsley v. Milne, 7 C. B. N. S. 115; and Longbottom v. Berry, L. R. 5 Q. B. 123, 39 L. J. Q. B. 125. As to the rails and sleepers of railways, see Turner v. Cameron, L. R. 5 Q. B. 306; and upon the general question, Gibson v. The Hammersmith Rail. Co., 32 L. J. Ch. 337; Elwes v. Mawes, post, vol. ii., and the note thereto. In Mather v. Fraser, 2 K. & J. 536, Wood, V.-C., doubted the reasoning in Hellawell v. Eastwood, but upon the erroneous assumption that fixtures can be distrained for rent. However, though the law is correctly laid down in the latter case, it may be questioned whether it was correctly applied to the facts. See Holland v. Hodgson, L. R. 7 C. P. 328, 41 L. J. C. P. 146. If a landlord distrains upon goods, and in his notice of distress includes fixtures, expressing an intention to sell them, but no actual seizure or severance of the latter takes place, he is not liable as for an unlawful distress upon the latter; Beck v. Denbigh, 29 L. J. C. P. 273. The distinction in questions of fixtures between cases of landlord and tenant and

those of mortgagor and mortgage is to be noted. See Climie v. Wood, L. R. 3. Ex. 257, 4 Ex. 328; Longbottom v. Berry, ubi sup.; Ex parte Barclay, L. R. 9 Ch. 576].

2d. Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ. That this class of property is exempt from distress has never been questioned. See Gisbourn v. Hurst, Salk. 249; 1 Inst. 47 a.; and Gibson v. Ireson, 3 Q. B. 39, in which the meaning of the phrase "public trade" was discussed. But the dispute has always been in ascertaining whether the goods in each particular case were so circumstanced as to fall within it. The examples commonly cited as being clearly within the rule, are those of cloth bailed to a tailor to make a garment, or a horse standing in a smith's shop to be shod; so, too, goods of the principal in the factor's hands cannot be distrained by the factor's landlord; Gilman v. Elton, 3 B. & B. 75; for the advancement of trade as much requires that goods should be placed in a factor's hands for sale, as in a carrier's for carriage; and, on the same principle, goods deposited for safe custody in a warehouse or a wharf would not be distrainable for rent due in respect thereof. Thompson v. Mashiter, 1 Bing. 283; Mathias v. Mesnard, 2 C. & P. 353. It has also been decided that goods deposited on the premises of an auctioneer for the purposes of sale, are privileged from a distress for rent due in respect of those premises; Adams v. Grane, 3 Tyrwh. 326; 1 C. & M. 390; for, to use the words of Bayley, B., "Interest reipublicae to bring buyers and sellers together at fixed places, where goods may be brought for the purposes of sale and exchange. This privilege is, therefore, of great importance to the owners of goods, who should not be exposed to the risk of losing them, from the default of the parties on whose premises they may be deposited for that purpose." This is so, though the place is only temporarily used for the purpose of an auction, and the auctioneer is wrongfully there. Brown v. Arundel, 10 C. B. 54; see Williams v. Holmes, 8 Exch. 861. And the Court of Queen's Bench has applied the same law to the case of a commission agent. Findon v. M'Laren, 6 Q. B. 891 [but the privilege is confined to goods on the premises of the auctioneer, and does not extend to goods in the custody of an auctioneer on the premises of the owner; Lyons v. Elliott, 1 Q. B. D. 210; 45 L. J. Q. B. 159. Similarly, goods pledged with a pawnbroker cannot be taken as a distress; Swire v. Leach, 18 C. B. N. S. 479; 34 L. J. C. P. 150; nor can furniture placed in a depository; Miles v. Furber, L. R. 8 Q. B. 77; 42 L. J. Q. B. 41].

In Brown v. Shevill, 2 A. & E. 138, a beast was sent to the premises of Woodham, a butcher, to be slaughtered, and after it had been slaughtered, the carcass was seized for rent due by Woodham. The Court of Queen's Bench held that it was not distrainable. This species of privilege, as is remarked by Bayley, B., in his judgment in Adams v. Grane, "has been from time to time increased in extent, according to the new modes of dealing established between parties by the change of times and circumstances, one of which modern modes of dealing is the case of a factor." His lordship in the same case cites and approves an observation made by Mr. Justice Blackstone, in his Commentaries, that "the exemption from liability to distress, in a case of this sort, occasions no hardship, because the privilege is generally applicable to goods which no man could possibly suppose to be the property of the individual from whom the rent is due."

In Muspratt v. Gregory, 1 M. & W. 633, it was held by the Exchequer, Parke, B., dissentiente, and confirmed in error, 3 M. & W. 678, that a barge, which a person meaning to purchase salt sent to the saltworks to carry it home was not privileged from distress for the arrears of a rent-charge. Vide tamen, as to the

case of a carriage actually containing privileged goods, Rede v. Barley, Cro. Eliz. 596; Gisbourn v. Hurst, Salk. 243. The same court subsequently held, in Joule v. Jackson, 7 M. & W. 450, that brewers' casks, left according to the usage of trade on a publican's premises with beer, were not privileged. [Things to come within the exception must be sent or delivered to a person in the way of his trade. Where, therefore, a ship in course of construction, and in respect of which all the instalments of purchase money then due had been paid, was distrained upon by the landlord of the builder, it was held that even assuming that the property in so much of the ship as had been built had passed to the purchaser, the ship did not come within the exception, and the distress was valid, Clarke v. Millwall Dock Co., 17 Q. B. D. 494; 55 L. J. Q. B. 378.]

In the case of Francis v. Wyatt, 1 Bl. R. 483, 3 Burr. 1498, the court seemed strongly inclined to think that a carriage standing in the yard of a livery stable was distrainable for rent due to his landlord by the keeper of the livery stable; and that opinion was approved and acted upon in Parsons v. Gingell, 4 C. B. 545. [But see Miles v. Furber, supra.] And in Wood v. Clarke, 1 Tyrwh. 314; 1 C. & J. 484, it was held that, though materials delivered by a manufacturer to a weaver, to be by him manufactured at his own home, were privileged from distress for rent due from the weaver to his landlord (see Gibson v. Ireson, 3 Q. B. 39), yet that a frame or other machinery delivered by the manufacturer to the weaver along with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, was not privileged, unless there were other goods upon the premises sufficient to satisfy the rent due. "This case," said Lord Lyndhurst, delivering the judgment of the court, "does not turn upon the privilege of a workman with respect to the implements and machinery by which his trade is to be carried on, but upon the privilege of the person by whom the workman is employed. The plaintiffs, who were the employers, furnished the workman not only with the materials on which he had to work, but also with the machinery by which the materials were to be worked up. The question is as to the extent of the employer's privilege, whether it is confined to the materials which he supplies, or applies also to the machinery by which the working-up is effected. It appears to us that it is confined to the materials, and does not include the machinery." . . . "None of the cases go beyond this: that the material to be worked up is privileged; that the conveyance by which it is carried to and from the place of manufacture is privileged; that it is privileged in the hands of the carrier while he is carrying it, in the hands of the factor to whom it is consigned, and in the hands and warehouse of a wharfinger, where it is lodged and deposited by the factor. There is no case or dictum that the machinery by which it is to be manufactured is included in the privilege." This decision is approved in Fenton v. Logan, 9 Bing. 676. As to cattle on their way to market, see Nugent v. Kirwan, 1 Jebb & S. 97.

3. Cocks and sheaves of corn, and other things which cannot be restored in the same plight.

See Wilson v. Ducket, 2 Mod. 61. The reason for this exemption was, that the distress being at common law merely a pledge, things were held not to be distrainable which could not be restored in the same plight as they were in at the time of taking them. And for this reason, butcher's meat cannot be distrained. Morley v. Pincombe, 2 Exch. 101. But by 2 W. & M. c. 5, sheaves or cocks of corn, or loose corn and hay lying upon any part of the land charged with the rent, may be seized, secured, and locked up in the place where found, in the nature of a distress, until replevied; but the same must not be removed, to the damage of the owner, from such place; and the landlord has, it would seem, no option, but must sell at the expiration of five days, per Parke, B., 1 M.

& W. 448. The benefit of this statute, at all events, since 4 Geo. 2, c. 28, s. 5, extends to the grantee of a rent-charge, though according to *Miller v. Green*, above cited, st. 11 G. 2, c. 19, s. 8, does not. *Johnson v. Faulkner*, 2 Q. B. 923.

4. Things in actual use.

These, as the text informs us, are privileged in order to prevent the breach of the peace which might be occasioned by an attempt to distrain them. See Field v. Adames, 12 A. & E. 652, where a replication that the things were in actual use was held good; and Bunch v. Kennington, 1 Q. B. 679, where it was bad for want of sufficient averments.

The above four sorts of property are the only sorts where absolute freedom from distress could be deduced from Simpson v. Hartopp; it is, however, proper to observe, that there are two other descriptions of goods absolutely privileged from distress at common law: 1st, Animals feræ naturæ, and other things, wherein no valuable property is in any person. Finch, 176; Bro. Abr., Property, pl. 20; Com. Dig. Dist. C.; Keilway, 30, b.; Co. Lit. 47, a.; 1 Rolle's Abr. 666. But deer in an inclosed ground not being a park do not fall within this exception; Daries v. Powell, Willes, 47; nor deer in a park, unless they are wild, according to Morgan v. Earl of Abergavenny, 8 C. B. 768, from which latter case, if it be law, it should seem to follow that if tenant for life of a park feed deer so as to diminish their wildness, he is in peril of an action for waste, quære. [See Ford v. Tynte, 31 L. J. Ch. 177, in which Morgan v. Earl of Abergavenny was acted upon.

Dogs have been said to be protected from distress on the ground that they are animals feræ naturæ; but it is clear that this cannot be now said of them, 2 Bl. Comm. 391; and that there may now be a valuable property in them. See the judgment of Willes, C. J., in Davies v. Powell, Willes, 46. Indeed, even in Lord Coke's time, trespass or trover would lie for a dog (Filow's Case, 12 Hen. 8, 3, pl. 3), without averring it to be tame; see Ireland v. Higgins, Cro. Eliz. 125; Com. Dig. Action on the Case upon Trover, C; Binstead v. Buck, 2 W. Bl. 1117; Sandys v. Hodgson, 10 A. & E. 472, and 1 Wms. Saund. 84. Yet Lord Coke (Co. Lit. 472) includes dogs, and upon his authority Rolle (Abr. Dist. H.), Comyns (Dig. Dist. C.), Viner (Abr. Dist. H.), Bacon (N. Abr. Dist. B.), Blackstone (3 Comm. 8), Stephen (Com. 8th ed. vol. iii. 249), Burton (Comp. 1014), all include dogs in the class of things not distrainable, because not the subject of valuable property, being animals feræ naturæ. It is, however, to be observed that Lord Coke, in a later part of his Institutes, classes dogs, more correctly it should seem, among those creatures domite nature, in which men may have a property, 4 Inst. 109; although that property appears to be in some sense of a base kind; see the Case of Swans, 7 Rep. 18 a., 1 Hawk. P. C. 314 and 511, where the reason why dogs were not at common law the subject of larceny is stated to be that, although a property may exist in them, yet "in respect of the baseness of their nature, they shall never be so highly regarded at law that for their sakes a man shall die;" and Filow's Case, supra, where Eliot, J., went so far in his depreciation of these animals as to lay down that dogs are vermin, and for that reason the church would not debase herself by taking tithes of them, though in Rastal, Ent. 611 b., pl. 10, 1 (see 1 Wms. Saund. 84), it appears that you may justify a battery in defence of your dog. According to the criminal law, dogs, though now (since the stat. 8 Vict. c. 47, s. 2) the theft of them is punishable, continue not to be considered goods or chattels; R. v. Robinson, 28 L. J. M. C. 58. See per Willes, J., in Cox v. Burbidge, 13 C. B. N. S. 430; 32 L. J. C. P. 89.

In Davies v. Powell, supra, Willes, C. J., took exception to Lord Coke's

rule regarding animals not distrainable, as being "plainly too general, for it is extended to dogs, yet it is clear now that a man may have a valuable property in a dog." Several text-writers have, in reliance upon this opinion, distinctly asserted that dogs are distrainable; see, for instance, Burn's Justice, Distress, 2. It may be admitted that if by the common law the remedy by distress did not apply to dogs specifically, no alteration in their qualities, or in the law relating to other remedies respecting them, could render them distrainable; for the maxim "cessante ratione cessat et ipsa lex" does not show that a liability of this description will arise whenever the reason for an exemption from it has ceased; yet it is not improbable that Lord Coke, in the passage referred to above, was only stating the general common-law rule with reference to things of no value, and giving what, in his opinion, were instances of the application of that rule. As to the property in several other kinds of animals, see Hannam v. Mockett, 2 B. & C. 934; and 1 Wms. Saund. 84.]

2dly. Things in the custody of the law, such as property already taken damage-feasant or in execution; 1 Inst. 47 a.; Gilb. Dist. ed. 1757, p. 44; Eaton v. Southby, Willes, 131; Peacock v. Purris, 2 B. & B. 362; Wright v. Dewes, 1 A. & E. 641; whether in the hands of the sheriff or of his vendee, Wharton v. Naylor, 12 Q. B. 673; but see as to growing crops, 14 & 15 Vict. c. 25, s. 2. Goods seized by the messenger under a fiat are not considered to be in custodiù legis for this purpose; Briggs v. Sowry, 8 M. & W. 729. [See now the Bankruptcy Act, 1883, s. 42.

Absolute immunity from distress is extended by stat. 46 & 47 Vict., c. 61, s. 45, in cases to which that act applies to "agricultural or other machinery" which is the bonâ fide property of a person other than the tenant, and is on the premises of the tenant under a bonâ fide agreement with him for the hire or use thereof in the conduct of his business, and live stock of all kinds which is the bonâ fide property of a person other than the tenant, and is on the premises of the tenant solely for breeding purposes.]

Next with respect to property conditionally privileged. Of this the Chief Justice enumerates two classes:

1. Beasts of the plough and instruments of husbandry. See *Davies* v. *Aston.* 1 C. B. 746 [to which should be added beasts which improve the land, as sheep: *Keen* v. *Priest*, 4 H. & N. 236, Com. Dig. Distress C., and 51 H. 3, stat. 3, whether they belong to the tenant or not; *Keen* v. *Priest*, *ibid*. Colts, steers, and heifers do not fall within this class, *ibid*.].

2. The instruments of a man's trade or profession.

These species of property are privileged, provided that there be other sufficient distress upon the premises; see [Co. Lit.], 47, a., b.; Fenton v. Logan, 9 Bing, 676; Gorton v. Falkner, 4 T. R. 565 [and if there be, trespass will lie for taking them; Nargett v. Nias. 1 E. & E. 439]. It is, however, settled that beasts of the plough may be distrained for poor-rates, though there are other distrainable goods on the premises, more than sufficient to answer the value of the demand; Hutchins v. Chambers, 1 Burr. 579. This decision proceeded on the analogy between such a distress and an execution. It must further be observed, with respect to things privileged sub modo, that, even though there be a sufficient distress besides, yet if that distress consists of growing crops which are only distrainable by statute, and are not immediately productive, the landlord is not bound to avail himself of it, but may distrain the things privileged sub modo; Pigott v. Birtles, 1 M. & W. 441. And possibly the principle of this decision may hereafter be thought to extend to every case of a distress given by statute but not liable to precisely the same rules of treatment as a distress at common law.

[A third instance of conditional privilege from distress is created by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), which enacts (s. 45) that "where live stock belonging to another person has been taken in by the tenant of a holding to which this Act applies" (see s. 54) "to be fed at a fair price" (which may be any fair equivalent, London & Yorkshire Bank v. Belton, 15 Q. B. D. 457, 54 L. J. Q. B. 568), "agreed to be paid for such feeding by the owner of such stock to the tenant, such stock shall not be distrained by the landlord for rent where there is other sufficient distress to be found." And the amount to be recovered by such distress is in no case to exceed the amount of such price remaining unpaid. Power is further given to the owner to redeem the stock so distrained before it is sold on payment to the distrainer of a sum equal to such price, and any payment so made shall be in discharge of any sum of the like amount due from the owner to the tenant for the feeding. The power to distrain to the extent of the price remaining due for the feeding is to continue so long as any portion of such live stock shall remain on the holding.]

To the above exceptions it may be well to add, that if a landlord either expressly or impliedly consent that chattels placed by a stranger on the tenant's land shall be exempt from his distress, it appears from Horsford v. Webster, 5 Tyrwh. 409, 1 C. M. & R. 696, S. C. [recognized in Giles v. Spencer, 3 C. B. N. S. 253], that he will be a trespasser if he detain them. In that case Parke, B., differed from the rest of the court, conceiving that the consent was not made out under the circumstances. See Walsh v. Rose, 6 Bing. 638. [The statutory power of distress given by the 19 & 20 Vict. c. 108, s. 5, for the benefit of landlords in cases in which goods have been seized under the warrant of a county court, does not extend to cases in which the goods seized belong to a stranger and not to the tenant; Beard v. Knight, 8 E. & B. 865; Wilcoxon v. Searby, 29 L. J. Exch. 154.

Another exemption has been created by the recent statute 34 & 35 Vict. c. 79, which under certain conditions protects the goods of lodgers from distress by a superior landlord.

By section 1. "If the superior landlord have distrained, or threatened to distrain, upon a lodger's furniture or goods for arrears of rent due to the landlord from his immediate tenant, the lodger may serve on the landlord or his bailiff a declaration that the immediate tenant has no property or beneficial interest in the said goods, and that the same are the property of him the lodger, and also setting forth whether any and what rent is due from the lodger to his immediate landlord, and the lodger may pay to the superior landlord, or to his bailiff, the rent, if any, so due as aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. There must be annexed to the declaration an inventory subscribed by the lodger of the furniture, &c., referred to in the declaration."

The declaration must be made after the distress has been made or threatened, and is therefore inoperative against a subsequent distress which had not been made or authorized or threatened at the time of the declaration; *Thwaites* v. *Wilding*, 12 Q. B. D. 4, 53 L. J. Q. B. 1. It need not state that the declarant is a lodger, or whether rent is due from the lodger to his landlord; *Ex parte Harris*, 16 Q. B. D. 130.

By section 2. "If the landlord proceed with the distress after the tenant has complied with the above provisions, he shall be guilty of an illegal distress, and the lodger may apply to a justice of the peace for restoration of the goods."

As to who may be lodger within the act, see Ness v. Stephenson, 9 Q. B. D. 245; Heawood v. Bone, 13 Q. B. D. 179; Phillips v. Henson, 3 C. P. D. 26; 47 L. J. C. P. 273.

By section 3. Any payment made by the lodger pursuant to the first section shall be deemed a valid payment on account of any rent due from him to his immediate landlord.]

As to distress and sale of goods which the tenant is under covenant to use upon the land, see Abbey v. Petch, 8 M. & W. 419; Frusher v. Lee, 10 M. & W. 709; Roden v. Eyton, 6 C. B. 427 [and Ridgway v. Lord Stafford, 6 Exch. 404. As to what property in the goods distrained upon is sufficient to enable a plaintiff to maintain an action for wrongful distress, see Fell v. Whittaker, L. R. 7 Q. B. 120; 41 L. J. Q. B. 78.

As to the effect in barring his right of action for the rent of the landlord's retaining unseld goods taken in distress of insufficient value to satisfy the whole rent due, see *Lehain v. Philpott*, L. R. 10 Ex. 242. As to the privilege of the goods of joint tenants from seizure under a distress against either, *Ex parte Parke*, L. R. 18 Eq. 381; 43 L. J. Bkcy. 139. As to the protection from distress of railway rolling stock when on hire, see 35 & 36 Vict. c. 50].

Things in the custody of the law are the most important class of articles exempt from distress. Thus goods of the tenant taken on execution are not distrainable; Hamilton v. Reedy, 3 McCord 38. Or on foreign attachment; Pierce v. Scott, 4 W. & S. 344. Or property in the hands of an assignee in insolvency; Buckey v. Snouffer, 10 Md. 149; Stahlman's Estate, 26 Pitts. Leg. Jour. 113. Or property in the hands of a receiver; Noe v. Gibson, 7 Paige 513; Everett v. Neff, 28 Md. 176. But it seems otherwise if a receiver of the tenant elects to accept the unexpired term, as then he would stand in the tenant's shoes; Martin v. Black, 9 Paige 641. Where a receiver has possession of the property, the landlord's course is to petition the court for an order that the receiver pay, or for liberty to proceed by distress or otherwise; Noe v. Gibson, 7 Paige 513; Everett v. Neff, 28 Md. 176. But the right to distrain is not taken away unless the sheriff takes possession of the goods; Newell v. Clark, 46 N. J. L. 363: and it revives if the officer withdraws from the premises without leaving a bailiff in charge; Milliken v. Selye, 6 Hill 623; Roe v. Roper, 23 U. C. C. P. 76; even if the debtor gives a receipt for the goods to the officer, with an undertaking to deliver them to him when requested; McIntire v. Stata, 4 U. C. C. P. 248: and the officer is allowed a reasonable time to remove the goods; Milliken v. Selve, 6 Hill 623. Where goods of a tenant are sold by virtue of an execution they are distrainable if not removed without unnecessary delay; Gilbert v. Moody, 17

Wend. 354. In this case the sale occurred Saturday afternoon, and a delay till Tuesday morning, without any cause assigned, was held unnecessary. And where the goods might have been removed on or after Dec. 27, they were held distrainable Jan. 5; Hughes v. Towers, 16 U. C. C. P. 287. Where goods are released from attachment under a bill of interpleader, their liability to distress revives, and the landlord's right to distress is superior to the right of the claimant in the interpleader; Gilliam v. Tobias, 11 Phila. 313. Where goods were sold for city taxes and bought on the nineteenth day of the month, but the whole purchase money was not paid till the twenty-third, during which time they were on the premises, in charge of the city, it was held that they were not in the custody of the law after the nineteenth, and were distrainable; Langton v. Bacon, 17 U. C. Q. B. 559. The goods of an absconding debtor attached by the sheriff are distrainable under the New York Revised Statutes: Acker v. Witherell, 4 Hill 112.

The statute of 8 Anne c. 14 § 1, which has been adopted in many States, creates an important exception in this class of cases by directing the sheriff to pay the landlord the rent due, but not exceeding a year's rent, out of the proceeds of the property seized on the premises by the execution. Under this statute the landlord can claim only the rent due at the time of taking the goods, not rent which accrues after the levy of the execution; Trappan v. Morie, 18 Johns. 1; Harris v. Dammann, 3 Mackey 90. And where the rent is payable quarterly, the landlord is not entitled to rent for the current year, but only to rent due on the last quarter day; Hazard v. Raymond, 2 Johns. 478. If the execution has been made after a distress levied, the landlord may complete his distress, and also claim the accruing year's rent; Biddle v. Biddle, 3 Harr. (Del.) 539. The landlord's remedy is confined to the goods of his immediate tenant; Brown v. Fay, 6 Wend. 392. A third person cannot claim a lien as landlord after failing to substantiate a claim to be the owner of the goods; Edward's Appeal, 105 Penn. St. 103. It makes no difference that the rent is payable in advance; Russell v. Doty, 4 Cow. 576. But the statute gives no lien to the vendor in the case of an agreement of sale where the purchaser enters into possession, and the vendor is given power to distrain for the non-payment of the instalments of the purchase money; Sackett v. Barnum, 22 Wend. 605.

A second important class is of things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employment. Thus, goods of a boarder in a boarding-house are not distrainable for rent due from the boarding-house keeper; Riddle v. Weldon, 5 Whart. 9. But they must be in the use of the boarder at the time, otherwise they are distrainable; Jones v. Goldbeck, 14 Phila. 173. Thus they are distrainable if in the actual use and possession of the keeper of the boarding-house with the consent of the boarder; Matthews v. Stone, 1 Hill 565; but see S. C., 7 Hill 428, where the court of errors differed on this point and finally reversed the decision on another ground. The goods of a transient boarder or lodger at an inn are not within this class, however, and are distrainable; Trieber v. Knabe, 12 Md. 491. Likewise the goods of a mere renter of rooms, for the same reason; Lane v. Steinmetz, 9 W. N. C. 574. Again, neither the raw material furnished to the tenant of a woollen factory to be woven into flannel nor the fabric when made is distrainable for rent owed by the tenant; Knowles v. Pierce, 5 Del. 178. Vessels sent to a shipyard for repair and the timber belonging to the sender to be used in the work are not distrainable for the rent of the yard; Gildersleeve v. Ault, 16 U. C. Q. B. 401. A negro slave bound out as an apprentice to a hairdresser is not distrainable for rent due from the master to whom he is bound; Phælon v. McBride, 1 Bay 170. Goods intrusted to an agent to be sold on commission are not distrainable for rent due from the agent; Home Sewing Machine Company v. Sloan, 87 Penn. St. 438; McCreary v. Claffin, 37 Md. 435. Likewise with goods sent to an auctioneer for sale; Himely v. Wyatt, 1 Bay 102. And a horse sent to a livery stable to be fed and taken care of; Youngblood v. Lowry, 2 McCord 39. And cattle received to be pastured for hire; Cadwalader v. Tindall, 20 Penn. St. 422. And goods deposited in a common or public warehouse for storage; Briggs v. Large, 30 Penn. St. 287; Owen v. Boyle, 22 Me. 47. And where an engine was left to be repaired and sold, the consideration for the repairing being the use thereof, and the sale to be made at a certain price, and, if not sold within six months, the repairer to retain the goods as owner, it seems they are not distrainable before the repairs are done; May v. Severs, 24 U. C. C. P. 396. But a billiard table rented by the owner of a

saloon from a third party, for use in the saloon, does not come within this class, being part of the saloon-keeper's stock-intrade, and is distrainable; Price v. McCallister, 3 Grant Cas. 248. The trade or employment need not be the tenant's only or chief employment. Goods placed for storage in the store of one who carries on the business of a merchant and also receives goods and merchandise on storage are not distrainable; Walker v. Johnson, 4 McCord 552. So water pumps deposited for storage with a wine merchant who also takes goods on storage are not distrainable; Connah v. Hale, 23 Wend. 462. But if the tenant is not a commission merchant, and it does not clearly appear in what capacity or character he received the goods, they are distrainable for rent due from him; Bevan v. Crooks, 7 W. & S. 452. And where goods were consigned for sale at certain prices below which the consignee was not to sell, but all above which he might keep for himself, and the consignee's habit was to transfer them to himself, charging himself with them at the invoice price, he was held not to be a commission merchant, and the goods were held distrainable; Hurd v. Davis, 23 U. C. Q. B. 123.

The decisions on other articles exempt are few. which are incapable of identification or which cannot be restored in the same plight are exempt, such as green hides placed in a vat to be tanned; Bond v. Ward, 7 Mass. 123; or sheaves and shocks of corn; Given v. Blann, 3 Blackf. 64. Nor is the rule as to the exemption of this class of articles altered if the law has made a power of sale incident to a distress; Given v. Blann, 3 Blackf. 64. Fixtures are exempt; Vausse v. Russel, 2 McCord 329; but otherwise, if severed from the freehold by the tenant or his agent; Cresson v. Stout, 17 Johns. 116; Reynolds v. Shuler, 5 Cow. 323. But fixtures slightly attached, which the tenant may remove at his pleasure, during the term, and which may be removed without destroying their character or injuring them, are distrainable, such as a spinning-mule fastened to the floor with wooden screws, so as to run; Furbush v. Chappel, 105 Penn. St. 187. The instruments of trade or profession are exempt, but only when in actual use, or when there is a sufficiency of other goods to meet the distress on the premises; Trieber v. Knabe, 12 Md. 491; Miller v. Miller, 17 U. C. C. P. 226; Hope v. White, 22 U. C. C. P. 5; Davis v. Arledge, 3 Hill (S. C.) 170. Whether a pair of horses belonging to a stranger which were driven on to premises and tied while the driver went into the house were in actual use is a question for the jury; Couch v. Crawfore, 10 U. C. C. P. 491.

Subject to these exemptions, the general rule is that all the movable goods and chattels found on the premises, whether belonging to a tenant or to a stranger, are distrainable; Kessler v. McConachy, 1 Rawle 435; O'Donnel v. Seybert, 13 S. & R. 54; Blanche v. Bradford, 38 Penn. St. 344; Kleber v. Ward, 88 Id. 93; Howard v. Ramsey, 7 Har. & J. 113; Neale v. Clantice, 7 Id. 372; Giles v. Ebsworth, 10 Md. 333; Davis v. Payne, 4 Rand. 332; Harvie v. Wickham, 6 Leigh 236; Reeves v. McKenzie, 1 Bailey 497; Bull v. Horlbeck, 1 Bay 301; Stevens v. Lodge, 7 Blackf. 594; Harris v. Boggs, 5 Id. 489; Elford v. Clark, 2 Brev. 88; Guest v. Opdyke, 31 N. J. L. 552; Spencer v. McGowan, 13 Wend. 256; Langton v. Bacon, 17 U. C. Q. B. 559. But otherwise, it seems, if the goods are there without the stranger's fault, and he endeavors to remove them without delay; Gilbert v. Moody, 17 Wend. 354. Statutes allowing the landlord to distrain goods clandestinely removed by the tenant do not apply to the goods of strangers; Adams v. LaComb, 1 Dall. 440: even if the goods are leased or bailed to the tenant; Sleeper v. Parrish, 7 Phila. 247. A provision in a constitution exempting a wife's property from liability for her husband's debts does not exempt the chattels of the wife of a stranger; Kennedy v. Lange, 50 Md. 91. And a stranger whose goods have been distrained upon cannot dispute the landlord's title any more than the tenant; Smith v. Aubrey, 7 U. C. Q. B. 90. A sub-lessee without the consent of the landlord is in the same position as any other stranger, and his goods are distrainable; Whiting v. Lake, 91 Penn. St. 349. Nor has such a sub-lessee a right to demand that the goods of his immediate landlord be first distrained upon, and that resort be had to his own goods only in case the others prove insufficient; Jimison v. Reifsneider, 97 Penn. St. 136. In many States the property of strangers is exempt by statute.

SCOTT v. SHEPHERD.

EASTER, 13 GEO. 3. - C. P. WILS. 403, S. C.

[REPORTED 2 BLACKSTONE, 892.]

Trespass and assault will lie for originally throwing a squib which, after having been thrown about in self-defence by other persons, at last put out the plaintiff's eye.

TRESPASS and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes, that he lost the sight of it, whereby, &c. On not guilty pleaded, the cause came on to be tried before Nares, J., last summer assizes at Bridgwater, when the jury found a verdict for the plaintiff with 100l. damages, subject to the opinion of the court on this case: - On the evening of the fair-day at Milborne Port, 28th October, 1770, the defendant threw a lighted squib, made of gunpowder, &c., from the street into the market-house, which is a covered building supported by arches, and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and then threw it across the said market-house when it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said markethouse, and in so throwing it struck the plaintiff, then in the

said market-house, in the face therewith, and the combustible matter, then bursting, put out one of the plaintiff's eyes. Qu. If this action be maintainable?

This case was argued last term by Glyn, for the plaintiff, and Burland, for the defendant: and this term, the Court, being divided in their judgment, delivered their opinions seriatim.

Nares, J., was of opinion that trespass would lie well in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has, by statute W. 3, been since made a nuisance. Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate; 11. Hen. 7, 28, is express that malus animus is not necessary to constitute a trespass. So, too, 1 Stra. 596. Hob. 134. T. Jones, 205, 6 Edw. 4, 7, 8. Fitzh. Trespass, 110. The principle I go upon is what is laid down in Reynolds v. Clarke, Stra. 634, that if the act in the first instance be unlawful, trespass will lie. Wherever, therefore, an act is unlawful at first, trespass will lie for the consequences of it. So, in 12 Hen. 4, trespass lay for stopping a sewer with earth, so as to overflow the plaintiff's land. In 26 Hen. 8, 8, for going upon the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also Hardr. 60. Reg. 108, 95. 6 Ed. 4, 7, 8. 1 Ld. Raym. 272. Hob. 180. Cro. Jac. 122, 43. F. N. B. 202, 91, G. I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient. Qui facit per aliud facit per se. He is the person who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages. So held in the King v. Huggins, 2 Lord Raym. 1574. Parkhurst v. Foster, 1 Lord Raym. 480. Rosewell v. Prior, 12 Mod. 639. And it was declared by this court, in Slater v. Baker,

M. 8 Geo. 3, 2 Wils. 359, that they would not look with eagles' eyes to see whether the evidence applies exactly or not to the case; but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.

Blackstone, J., was of opinion that an action of trespass did not lie for Scott against Shepherd, upon this case. He took the settled distinction to be, that where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the case: Reynolds v. Clarke, Lord Raym. 1401. Stra. 634; Haward v. Bankes, Burr. 1114; Harker v. Birbeck, Burr. 1159. The lawfulness or unlawfulness of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in Stra. 635, where it can only mean, that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain; but as it was a lawful act (upon the defendant's own ground), and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule; for it is held by the court in the same case, that if I throw a log of timber into the highway (which is an unlawful act), and another man tumbles over, and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it I hit another man, he may bring trespass because it is an immediate wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbor's ground, and I go thereon to fetch it, trespass lies. This is the case cited from 6 Edw. 4, 7. But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognizance thereby, I shall have an action on the case: per Powel, J., 11 Mod. 180. Yet here the original act was unlawful, and in the nature of trespass. So that lawful or unlawful is quite out of the case; the solid distinction is between direct or immediate injuries on the one hand, and mediate or consequential on the other. And trespass never lay for the latter. If this be so, the only question will be whether the injury which the plaintiff suffered was immediate or consequential only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal or Scott. The tortious act was complete

when the squib lay at rest upon Yates' stall. He, or any bystander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endamage others. But Shepherd, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed upon it, and the new direction given it, by either Willis or Ryal; who both were free agents, and acted upon their own judgment. This differs from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the vis impressa, is continued, though diverted. Here the instrument of mischief was at rest, till a new impetus and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, till after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still. Yet if any person gives that stone a new motion, and does farther mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates may maintain trespass against Shepherd. And, according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act; nav, it may be extended in infinitum. If a man tosses a football into the street, and, after being kicked about by one hundred people, it at last breaks a tradesman's window, shall we have trespass against the man who first produced it? Surely only against the man who gave it that mischievous direction. But it is said, if Scott has no action against Shepherd, against whom must be seek his remedy? I give no opinion whether case would lie against Shepherd for the consequential damage; though, as at present advised, I think upon the circumstances it would. But I think, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence, and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house, instead of brushing it down, or throwing it out of the open sides into the street (if it was not meant to continue the sport as it is called), was at

least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger to either his goods or his person (a); nothing but inevitable necessity; Weaver v. Ward, Hob. 134; Dickenson v. Watson, T. Jones, 205; Gilbert v. Stone, Al. 35, Styl. 72. So in the case put by Bryan, J., and assented to by Littleton and Cheke, C. J., and relied on in Raym. 467. "If a man assaults me, so that I cannot avoid him, and I lift up my staff to defend myself, and, in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavoring to defend myself." But none of these great lawyers ever thought that trespass would lie, by the person struck, against him who first assaulted the striker. The cases cited from the Register and Hardres are all of immediate acts, or the direct and inevitable effects of the defendant's immediate act. And I admit the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act. But what is his own immediate act? The throwing the squib to Yates' stall. Had Yates' goods been burnt, or his person injured, Shepherd must have been responsible in trespass. But he is not responsible for acts of other men. The subsequent throwing across the market-house by Willis is neither the act of Shepherd, nor the inevitable effect of it; much less the subsequent throwing by Ryal. Slater v. Barker was first a motion for a new trial after verdict. In our case the verdict is suspended till the determination of the court. And although after verdict the court will not look with eagle's eyes to spy out a variance, yet when a question is put by the jury upon such a variance, and it is made the very point of the cause, the court will not wink against the light, and say that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. 2. It was an action on the case that was brought, and the court held the special case laid to be fully proved. So that the present question could not arise upon that action. 3. The same evidence that will maintain trespass may also frequently maintain case, but not e converso. Every action of trespass with a "per quod" includes an action on the case. I may bring trespass for the immediate injury, and subjoin a "per quod" for the consequen-

⁽a) Holmes v. Mather, L. R. 10 Ex. 261; 44 L. J. Ex. 176.

tial damages; — or may bring case for the consequential damages, and pass over the immediate injury, as in the case from 11 Mod. 180, before cited. But if I bring trespass for an immediate injury, and prove at most only a consequential damage, judgment must be for the defendant; Gates and Bailey, Tr. 6 Geo. 3, 2 Wils. 313. It is said by Lord Raymond, and very justly, in Reynolds v. Clarke, "we must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." As I therefore think no immediate injury passed from the defendant to the plaintiff (and without such immediate injury no action of trespass can be maintained), I am of opinion that in this action judgment ought to be for the defendant.

Gould, J., was of the same opinion with Nares, J., that this action was well maintainable. The whole difficulty lies in the form of the action, and not in the substance of the remedy. The line is very nice between case and trespass upon these occasions: I am persuaded there are many instances wherein both or either will lie. I agree with Brother Nares, that wherever a man does an unlawful act, he is answerable for all the consequences; and trespass will lie against him, if the consequences be in nature of trespass. But exclusive of this, I think the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed upon Willis and Ryal excited self-defence, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act. Had the squib been thrown into a coach full of company, the person throwing it out again would not have been answerable for the consequences. (a) What Willis and Ryal did was by necessity, and the defendant imposed that necessity upon them. As to the case of the football, I think that if all the people assembled act in concert, they are all trespassers: 1, from the general mischievous intent; 2, from the obvious and natural consequences of such an act; which reasoning will equally apply to the case before us. And that actions of trespass will lie for the mischievous consequences of another's act, whether lawful or unlawful, appears from their being maintained for acts done in the plaintiff's own land; Hardr. 69; Courtney v. Collett, 1 Lord Raym. 272. I shall not go over again the ground which Brother Nares has relied on

⁽a) But see Whalley v. L. & Y. Rail. Co., 13 Q. B. D. 131, 53 L. J. Q. B. 285.

and explained, but concur in his opinion, that this action is supported by the evidence.

De Grey, C. J. — This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass vi et armis lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with my Brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident; as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending one's self by a stick which strikes another behind, &c. They may also not lie for the consequences of illegal acts, as that of casting a log on the highway, &c. But the true question is, whether the injury is the direct and immediate act of the defendant, and I am of opinion that in this case it is. throwing the squib was an act unlawful, and tending to affright the bystander. So far mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows he is the author of it: Egreditur personam, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows: if done with a deliberate intent the consequences may amount to murder; if incautiously, to manslaughter: Fost. 261. So too, in 1 Ventr. 295, a person breaking a horse in Lincoln's-Inn-Fields hurt a man; held, that trespass lay: and 2 Lev. 172, that it need not be laid scienter. I look upon all that was done subsequently to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95, a, for trespass in maliciously cutting down a

head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate act need not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged that the intervention of a free agent will make a difference: but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsory necessity for their own safety and self-preservation. On these reasons I concur with Brothers Gould and Nares that the present action is maintainable.

Postea to the plaintiff.

[THE note to Scott v. Shepherd, which was almost wholly devoted to an examination of the distinction between the action of trespass and the action on the case, has been omitted in the 7th, 8th, and present editions. The provisions of the Common Law Procedure Act, 1852, with its ample powers of Amendment, had already deprived the distinction itself of practical importance except as a test of liability in particular cases, and the changes in the system of pleading introduced by the Supreme Court of Judicature Act, 1873, entirely destroy whatever significance still attached to the different forms of action. The case itself, however, has been retained, as it contains in a short compass not only much that is of interest to those who study the gradual development of the law, but also much that is of practical value upon the question of direct and consequential damage.

No doubt, as was pointed out in the note to this case in previous editions, the distinction above referred to was sometimes a test of substantial liability, as for example] in the modern case of Sharrod v. London & South-Western Rail. Co., 4 Exch. 580, which, for want of being properly understood, has met with some animadversion, in which a railway company was sued in an action of trespass for an injury to cattle which had strayed upon the railway, by a train passing along the line, and held not to be liable in that form of action. A moment's reflection will suggest that if the company could be so sued, all questions of duty to fence, careful driving, &c., upon which the liability of the company ought to depend, would [in the absence of amendment] have been excluded by the nature of the inquiry called for by the plaintiff; and the case involves the substantive decision that a railway company is not liable for injury to cattle straying upon the line, unless it is alleged and proved that such injury was occasioned by its own or its servants' wrongful or negligent act.

[Another instance in which the matters considered in the principal case may still be of practical importance is to be found in that class of cases where it becomes necessary to determine] whether a cause of action, the damage resulting from which is not apparent at the time, be barred by the Statute of Limitations. See [Backhouse v. Bonomi, 9 H. of L. Ca. 509, overruling some important dicta in] Nicklin v. Williams, 10 Exch. 259 [and Whitehouse v. Fellowes, 10 C. B. (N. S.) 765; Mitchell v. Darley Main Coll. Co., 14 Q. B. D. 125; 11 App. Cas. 127; 53 L. J. Q. B. 471.

For a modern case in which the law as to defending one's own property against a common enemy to the damage of one's neighbor was considered, see Whalley v. L. & Y. Rail. Co., 13 Q. B. D. 131; 53 L. J. Q. B. 285, ante, p. 317.]

- When trespass will lie, and when trespass on the case. (1) If the injury be immediate or direct, trespass is the proper remedy. If the injury be purely consequential, or indirect, case is the only remedy; Pruitt v. Ellington, 59 Ala. 454; Clark v. Peckham, 9 R. I. 455; Percival v. Hickey, 18 Johns. 257; Ricker v. Freeman, 50 N. H. 420; Jordan v. Wyatt, 4 Gratt. 151; Cotteral v. Cummins, 6 S. & R. 343; Smith v. Rutherford, 2 S. & R. 358.
- (2) Intent.— When the injury is immediate, and the act of the defendant wilful, trespass is the only remedy; Baldridge v. Allen, 2 Ired. 206; Wilson v. Smith, 10 Wend. 324; Brennan v. Carpenter, 1 R. I. 474. But where, though the injury is immediate, it is occasioned by the carelessness and negligence, and not the wilful act, of the defendant, trespass or case will lie, at the option of the plaintiff; Blin v. Campbell, 14 Johns. 432; Claffin v. Wilcox, 18 Vt. 605; Schuer v. Veeder, 7 Blackf. 342. Cases contra, see Gates v. Miles, 3 Conn. 64; Taylor v. Rainbow, 2 Hen. & Mun. 423.
- (3) The lawfulness or unlawfulness of the defendant's act:—Where an act is lawful, as the fixing of a spout, and the consequence injurious, case lies, and not trespass; Reynolds v. Clarke, 1 Strange 634. So if, in repairing a highway, earth is improperly piled against the fence of an adjoining landowner, the remedy is case, and not trespass; Felch v. Gilman, 22 Vt. 38. But see 1 Chitty Plead.* 145 (16 Am. ed.). "Legality or illegality of the original act is not, in general, the test or criterion, whether the injury was immediate or consequential, or whether the remedy should be trespass or case;" Phila., etc., R. Co. v. Wilt, 4 Whart. 143.

Injuries done under color of process of law.—(1) If the injury be occasioned by the regular process of a court of competent jurisdiction, case is the proper remedy; thus, for malicious prosecution, case lies, and not trespass; Warfield v. Walter, 11 Gill & Johns. 80; King v. Parks, 19 Johns. 375; Sheppard v. Furniss, 19 Ala. 760; Riley v. Johnson, 13 Ga. 260; Sleight v. Ogle, 4 E. D. Smith 445. If the proceeding be malicious and unfounded, though instituted in a court having no jurisdiction, either case or trespass may be brought; Goslin v. Wilcock, 2 Wils. 302. (2) If the process be merely voidable, the remedy is case, and not trespass; Haywood v. Shed, 11 Mass. 500; Tripp v. Martin, 1 Speers 236; Cooper v. Halbert, 2 McMullan 419. (3) If the process be void, trespass lies and not case; Agry

v. Young, 11 Mass. 220, where an action was brought against assessors for assessing one not liable to assessment by them, and causing him to be arrested for the non-payment of the tax. But see Osgood v. Clark, 26 N. H. 307, where it was held either trespass or case would lie. So for false imprisonment, trespass is the proper form of action; Allen v. Greenlee, 2 Dev. 370; Stanton v. Seymour, 5 McL. 267; Price v. Graham, 3 Jones 545; Platt v. Niles, 1 Edm. (N. Y.) Sel. Cases 230; Maher v. Ashmead, 30 Penn. St. 344; Kramer v. Lott, 50 Penn. St. 495. Trespass is the proper remedy against a magistrate illegally issuing a process, but the remedy against the person who procures the warrant to be issued on insufficient information is case; Riley v. Johnson, 13 Ga. 260.

Ministerial officers. — Trespass is the proper remedy against an officer who, acting under process of law, wrongfully takes goods; Codman v. Freeman, 3 Cush. 306; Wickliffe v. Sanders, 6 Mon. 296. By mere neglect to take proper care of goods which he has regularly attached, an officer does not become a trespasser ab initio, and the owner's remedy is case; Nutt v. Wheeler, 30 Vt. 436. Trespass or case will lie against an officer for selling defendant's goods under an execution in disregard of his claim for the benefit of the execution laws; Van Dresor v. King, 34 Penn. St. 201. Either trespass or case will lie against a military officer for seizure of goods or arrest of person on a warrant to collect a fine illegally issued by such officer; Bixby v. Harris, 26 N. H. 125. Case lies against a ministerial officer for any breach of duty, whether intentional, malicious, or not; Keith v. Howard, 24 Pick, 292.

Master and servant. — It is now well settled that corporations, like individuals, are liable in trespass for the acts of their servants or agents, done within the scope of their authority, or by special direction of the corporation; Denver & R. G. R'y Co. v. Harris, 2 Penn. Rep. 369; Lee v. Village of Sandy Hill, 40 N. Y. 442; Watson v. Bennett, 12 Barb. 196; Allen v. Decatur, 23 Ill. 332; Mobile, etc., R'y Co. v. McKellar, 59 Ala. 458; Yahoola, etc., Co. v. Irby, 40 Ga. 479. For the act of his servant done in his presence and with his consent, the master will be liable in trespass; Byram v. M'Guire, 3 Head 530. If an injury occurs as the necessary, probable, or natural consequence of an act ordered by the master, then the act is the master's, and the remedy is trespass (if the act be forcible or

immediate); Howe v. Newmarch, 12 Allen 49; Sharrod v. London, etc., R'y Co., 4 Exch. 580. Though it was formerly held that if an injury arose from the carelessness or negligence of the defendant's servant, case, and not trespass, was the proper remedy; Johnson v. Castleman, 2 Dana 378; Broughton v. Whallon, 8 Wend. 474; Thames Steamboat Co. v. Housatonic R. R. Co., 24 Conn. 40; Yerger v. Warren, 31 Penn. St. 319; Barnes v. Hurd, 11 Mass. 57; Wright v. Wilcox, 19 Wend. 343. It would be held now, probably, that the defendant, as well as the servant, would be liable in either form of action, the doctrine being that, within the scope of his employment, the act of the servant is the act of the master, and the master, therefore, is liable to just the same action which the servant would be; Redfield on Law of Railways, vol. 1, 544, n. 6 (6 ed.); Louisville, etc., R. R. Co. v. Collins, 2 Duv. 114; Pittsburg, etc., R. R. Co. v. Ruby, 38 Ind. 312. For seducing or debauching wives, daughters, or servants, either trespass or case will lie, though where there is force trespass is the proper remedy; Hoover v. Heim, 7 Watts 62; Van Vacter v. McKellys, 7 Blackf. 578; Ball v. Bruce, 22 Ill. 161; Furman v. Applegate, 3 Zabr. 28; Ream v. Rank, 3 S. & R. 215; Moran v. Dawes, 4 Cowen 412; Parker v. Elliotte, 6 Munf. 587; Woodward v. Walton, 2 N. R. 476.

Landlord and tenant. - If the tenant is in possession, the landlord cannot maintain trespass quare clausum against a stranger; Roussin v. Benton, 6 Mo. 592. If the lessee in possession is other than a tenant at will, for an injury to the inheritance by a stranger case is the proper form of action; Lienow v. Ritchie, 8 Pick. 235; Greber v. Kleckner, 2 Barr. 289. Even if the lessee is a tenant at will, the landlord cannot maintain trespass quare clausum, unless the freehold or some fixture on it is injured; Lyford v. Toothaker, 39 Me. 28; but if the lessee is tenant at will, for an injury by a stranger to the freehold, the landlord may maintain trespass quare clausum; Starr v. Jackson, 11 Mass. 519. If one claiming to be landlord enter upon premises occupied by his alleged tenant, under valid legal process, the tenant cannot maintain trespass quare clausum, case being the proper remedy; Melson v. Dickson, 63 Ga. 682. Where trees are cut, the reversioner may bring trespass de bonis, though never actually possessed; Lane v. Thompson, 43 N. H. 320. Case cannot be maintained by one having the legal title to

land, against another, who enters and cuts timber, etc., the owner, though out of possession, having the right of possession; Robertson v. Rodes, 13 B. Monr. 325. In general, whether the property affected be real or personal, trespass will not lie unless the plaintiff show in himself actual or constructive possession, or the immediate right of possession; otherwise, the remedy is case; Heath v. West, 8 Fost. 101; Halligan v. Chicago, &c., R. R. Co., 15 Ill. 558; Miller v. Bomar, 9 Rich. 139.

Incorporeal rights. — Case is the proper remedy for an injury to an incorporeal right; Wilson v. Smith, 10 Wend. 324; Seneca Road Co. v. Auburn, &c., R. R. Co., 5 Hill (N. Y.) 170; Union Petroleum Co. v. Bliven Petroleum Co., 72 Penn. St. 173; Osborne v. Butcher, 2 Dutch. 308. For infringement of a patent, case lies; Stein v. Goddard, McAll. 82. For disturbing use of a pew, case is the remedy; Perrin v. Granger, 33 Vt. 101; Marshall v. White, Harp. 122. One in actual use of tangible property may maintain trespass for a direct injury to it, though his right to use it be incorporeal merely; e. g., a franchise; Wilson v. Smith, supra. Remedy for the abuse of a license to pass over land is case, not trespass; Stone v. Knapp, 29 Vt. 501; Hinks v. Hinks, 46 Me. 423. Case lies for obstructing a right of way appurtenant to an estate leased at will, in favor of the lessor, on proof of actual damage; Cushing v. Adams, 18 Pick. 110.

When a life tenant and remainder-man sue jointly for injury to land, case is the proper action; McIntire v. Westmoreland Coal Co., 11 Atlantic Rep. 808. For preventing the use of a schoolhouse, the inhabitants may bring case, but only the district can bring trespass quare clausum; Chaplin v. Hill, 24 Vt. 528.

Distinction between trespass and trespass on the case as a matter of pleading is very generally abolished by statute. — Independently of statute, trespass and case cannot be joined; Sheppard v. Furniss, 19 Ala. 760; Guildford v. Kendall, 42 Ala. 651. The form of action, however, is determined by the pleading, not by what the action is termed; U.S. Manuf. Co. v. Stevens, 52 Mich. 330; Coggswell v. Baldwin, 15 Vt. 404. The distinction between trespass and case still exists in Alabama; Guildford v. Kendall, supra; but is abolished in the following, and probably in other States: California, Fraler v. Sears, 12 Cal. 555; Connecticut, Gen. Sts. 1888, tit. 18, c. 69, § 872; Dela-

ware, Rev. Code 379; Bailey v. Wiggins, 1 Houston 299; Indiana, Hines v. Kinnison, 8 Blackf. 119; Illinois, Blalock v. Randall, 76 Ill. 224; Iowa, Rev. Sts., 1851, § 1733; Brown v. Hendrickson, 27 N. W. R. 914; Kentucky, Kountz v. Brown, 16 B. Monr. 577; Mass. P. S., 1882, c. 167; Maine, Rev. Sts., 1883, c. 82, § 15; Maryland, Williams v. Bramble, 2 Md. 313; Missouri, Rev. Code, 1855, p. 1228; New York, 2 R. S. 456, § 16 (2d ed.); Texas, Carter v. Wallace, 2 Tex. 206; Tennessee, Luttrell v. Hazen, 3 Sneed 20; Vermont, Alger v. Curry, 38 Vt. 382; Virginia, Code, 1873, c. 145, § 6; West Virginia, Hood v. Maxwell, 1 W. Va. 219; Wisconsin, see Schultz v. Frank, 1 Wisc. 352.

MILLER v. RACE.

HILARY, 31 GEO. 3.

[REPORTED 1 BURR. 452.]

Property in a bank-note passes, like that in cash, by delivery; and a party taking it bonâ fide and for value is entitled to retain it as against a former owner from whom it has been stolen.

It was an action of trover against the defendant, upon a bank-note, for the payment of twenty-one pounds ten shillings to one William Finney, or bearer, on demand.

The cause came on to be tried before Lord Mansfield, at the sittings in Trinity term last at Guildhall, London: and upon the trial it appeared that William Finney, being possessed of this bank-note on the 11th of December, 1756, sent it by the general post, under cover, directed to one Bernard Odenharty, at Chipping Norton, in Oxfordshire; that on the same night the mail was robbed, and the bank-note in question (amongst other notes) taken and carried away by the robber; that this bank-note, on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of the bank-note being taken out of the mail.

It was admitted and agreed that, in the common and known course of trade, bank-notes are paid by and received of the holder and possessor of them, as cash; and that in the usual way of negotiating bank-notes, they pass from one person to another as cash, by delivery only, and without any further inquiry or evidence of title than what arises from the possession.

It appeared that Mr. Finney, having notice of this robbery on the 13th of December, applied to the Bank of England "to stop the payment of this note;" which was ordered accordingly, upon Mr. Finney's entering into proper security "to indemnify the bank."

Some little time after this the plaintiff applied to the bank for the payment of this note; and, for that purpose, delivered the note to the defendant, who is a clerk in the bank; but the defendant refused either to pay the note or to redeliver it to the plaintiff. Upon which this action was brought against the defendant.

The jury found a verdict for the plaintiff, and the sum of 21l. 10s. damages; subject, nevertheless, to the opinion of this court upon this question: — "Whether, under the circumstances of this case, the plaintiff had a sufficient property in the bank-note to entitle him to recover in the present action."

Mr. Williams was beginning on behalf of the plaintiff: —

But Lord Mansfield said, "That as the objection came from the side of the defendant, it was rather more proper for the defendant's counsel to state and urge their objection."

Sir Richard Lloyd for the defendant.

The present action is brought not for the money due upon the note, but for the note itself, the paper, the evidence of the debt. So that the right to the money is not the present question: the note is only an evidence of the moneys being due to him as bearer.

The note must either come to the plaintiff by assignment, or must be considered as if the bank gave a fresh, separate, and distinct note to each bearer. Now, the plaintiff can have no right by the assignment of a robber. And the bank cannot be considered as giving a new note to each bearer; though each bearer may be considered as having obtained from the bank a new promise.

I do not say whether the bank can or cannot stop payment: that is another question. But the note is only an instrument of recovery.

Now this note, or these goods (as I may call it), was the property of Mr. Finney, who paid in the money: he is the real owner. It is like a medal which might entitle a man to payment of money, or to any other advantage. And it is by Mr. Finney's authority and request that Mr. Race detained it.

It may be objected, "that this note is to be considered as cash in the usual course of trade." But the course of trade is not at all affected by the present question, about the right to the note. A different species of action must be brought for the note from what must be brought against the bank for the money. And this man has elected to bring trover for the note itself, as owner of the note; and not to bring his action against the bank, for the money. In which action of trover, property cannot be proved in the plaintiff, for a special proprietor can have no right against the true owner.

The cases that may affect the present are 1 Salk. 126 M.; 10 W. 3; Anonymous, coram Holt, Chief Justice, at Nisi Prius at Guildhall. The Lord Chief Justice Holt held, "That the right owner of a bank-bill, who lost it, might have trover against a stranger who found it; but not against the person to whom the finder transferred it for a valuable consideration, by reason of the course of trade, which creates a property in the assignee or bearer;" 1 Lord Raymond, 738, S.C., in which case the note was paid away in the course of trade: but this remains in the man's hands, and is not come into the course of trade. H. 12 W. 3 B. R.; 1 Salk. 283, 284, Ford v. Hopkins, per Holt, Chief Justice, at Nisi Prius at Guildhall. "If banknotes, exchequer-notes, or million-lottery tickets, or the like, are stolen or lost, the owner has such an interest or property in them as to bring an action, into whatsoever hands they come. Money or cash is not to be distinguished: but these notes or bills are distinguishable, and cannot be reckoned as cash; and they have distinct marks and numbers on them." Therefore the true owner may seize these notes wherever he finds them, if not passed away in the course of trade.

1 Strange, 505. H. 8 G. 1. In Middlesex, coram Pratt, Chief Justice, Armory v. Delamirie (a) — A chimney-sweeper's boy found a jewel. It was ruled "that the finder has such a property as will enable him to keep it against all but the rightful owner; and, consequently, may maintain trover."

This note is just like any other piece of property, until passed away in the course of trade. And here the defendant acted as agent to the true owner.

Mr. Williams, contra, for the plaintiff.

⁽a) See this case set forth at large, ante p. 385.

The holder of this bank-note, upon a valuable consideration, has a right to it, even against the true owner.

1st. The circulation of these notes vests a property in the holder, who comes to the possession of it upon a valuable consideration.

2dly. This is of vast consequence to trade and commerce: and they would be greatly incommoded if it were otherwise.

3dly. This falls within the reason of a sale in market-overt; and ought to be determined upon the same principle.

First—He put several cases where the usage, course, and convenience of trade made the law, and sometimes even against an act of parliament, 3 Keb. 444, Stanley v. Ayles, per Hale, Chief Justice, at Guildhall; 2 Strange, 1000, Lumley v. Palmer, where a parol acceptance of a bill of exchange was holden sufficient against the acceptor, 1 Salk. 23 (a).

Secondly — This paper credit has been always, and with great reason, favored and encouraged, 2 Strange, 946, Jenys v. Fawler et al.

The usage of these notes is, "that they pass by delivery only; and are considered as current cash; and the possession always carries with it the property." 1 Salk. 126, pl. p. 5, is in point.

A particular mischief is rather to be permitted than a general inconvenience incurred. And Mr. Finney, who was robbed of this note, was guilty of some laches in not preventing it.

Upon Sir Richard Lloyd's argument, a holder of a note might suffer the loss of it for want of title against a true owner; even if there were a chasm in the transfers of it through one only out of five hundred hands.

Thirdly — This is to be considered upon the same foot as a sale in market-overt.

2 Inst. 713. "A sale in market-overt binds those that had a right."

But it is objected by Sir Richard, "that there is a substantial difference between a right to the note, and a right to the money." But I say a right to the money will attract to it a right to the paper. Our right is not by assignment, but by law, by the usage and custom of trade. I do not contend that

⁽a) [See now The Bills of Exchange 2, by which a parol acceptance of a bill Act, 1882, 45 & 46 Vict. c. 61, s. 17, sub-s. of exchange is rendered insufficient.]

the robber, or even the finder of a note, has a right to the note; but, after circulation, the holder upon a valuable consideration has a right.

We have a property in this note; and have recovered the value against the withholder of it. It is not material what action we could have brought against the bank.

Then he answered Sir Richard Lloyd's cases; and agreed that the true owner might pursue his property, where it came into the hands of another, without a valuable consideration or not in the course of trade: which is all that Lord Chief Justice *Holt* said in 1 Salk. 284.

As to 1 Strange, 505, he agreed that the finder has the property against all but the rightful owner: not against him.

Sir Richard Lloyd in reply:

I agree that the holder of the note has a special property; but it does not follow that he can maintain trover for it against the true owner.

This is not only without, but against the consent of the owner.

Supposing this note to be a kind of mercantile cash; yet it has an ear-mark, by which it may be distinguished; therefore trover will lie for it. And so is the case of *Ford* v. *Hopkins*.

And you may recover a thing stolen from a merchant, as well as a thing stolen from another man. And this note is a mere piece of paper: it may be as well stopped as any other sort of mercantile cash (as, for instance, a policy which has been stolen). And this has not been passed away in trade; but remains in the hands of the true owner. And therefore it does not signify in what manner they are passed away, when they are passed away, for this was not passed away. Here, the true owner or his servant (which is the same thing) detains it. And surely robbery does not divest the property.

This is not like goods sold in market-overt: nor does it pass in the way of a market-overt: nor is it within the reason of a market-overt. Suppose it was a watch stolen; the owner may seize it, though he finds it in a market-overt, before it is sold there. But there is no market-overt for bank-notes.

I deny the holder's (merely as holder) having a right to the note, against the true owner: and I deny that the possession gives a right to the note.

Upon this argument on Friday last, Lord Mansfield then

said, that Sir Richard Lloyd had argued it so ingeniously, that (though he had no doubt about the matter) it might be proper to look into the cases he had cited, in order to give a proper answer to them: and therefore the court deferred giving their opinion to this day. But at the same time, Lord Mansfield said he would not wish to have it understood in the City that the court had any doubt about the point.

Lord Mansfield now delivered the resolution of the court.

After stating the case at large, he declared, that at the trial he had no sort of doubt but that this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce: which would be much incommoded by a contrary determination.

It has been very ingeniously argued by Sir Richard Lloyd, for the defendant. But the whole fallacy of the argument turns upon comparing bank-notes to what they do not resemble, and what they ought not to be compared to, viz., to goods, or to securities, or documents for debts.

Now, they are not goods, nor securities, nor documents for debts, nor are so esteemed: but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are; or any other current coin, that is used in common payments, as money or cash.

They pass by a will, which bequeaths all the testator's money or cash; and are never considered as securities for money, but as money itself. Upon Lord Ailesbury's will, 900l. in bank-notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes.

So, on bankruptcies, they cannot be followed as identical and distinguishable from money: but are always considered as money or cash.

'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench; and mistake their meaning. It has been quaintly said, "that the reason why money cannot be followed is, because it has no earmark; but this is not true. The true reason is, upon account of the currency of it: it cannot be recovered after it has passed

in currency (a). So in case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly, upon a valuable and bonâ fide consideration: but before money has passed in currency, an action may be brought for the money itself. There was a case in 1 G. 1, at the sittings, Thomas v. Whip, before Lord Macclesfield; which was an action upon assumpsit, by an administrator against the defendant, for money had and received to his use. The defendant was nurse to the intestate during his sickness; and being alone, conveyed away the money. And Lord Macclesfield held that the action lay. Now this must be esteemed a finding at least.

Apply this to a case of a bank-note. An action may lie against the finder, it is true (and it is not at all denied); but not after it has been paid away in currency. And this point has been determined even in the infancy of bank-notes; for 1 Salk. 126, M. 10 W. 3 Nisi Prius, is in point. And Lord Chief Justice Holt there says, that it is "by reason of the course of trade; which creates a property in the assignee or bearer." (And "the bearer" is a more proper expression than assignee.)

Here an innkeeper took it, bonâ fide, in his business, from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber: for this matter was strictly inquired and examined into at the trial; and is so stated in the case, "that he took it for a full and valuable consideration, in the usual course of business." Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for 1000l. it might have been suspicious: but this was a small note for 21l. 10s. only: and money given in exchange for it.

Another case cited was a loose note in 1 Ld. Raym. 738, ruled by Lord Chief Justice Holt at Guildhall, in 1698; which proves nothing for the defendant's side of the question: but it is exactly agreeable to what is laid down by my Lord Chief Justice Holt in the case I have just mentioned. The action did not lie against the assignee of the bank-bill; because he had it for valuable consideration.

In that case he had it from the person who found it; but the

⁽a) [See Foster v. Green, 7 H. & N. 881; 31 L. J. Exch. 158; and Taylor v. Plumer, 3 M. & S. 562.]

action did not lie against him, because he took it in the course of currency: and therefore it could not be followed in his hands. It never shall be followed into the hands of a person who bona fide took it in the course of currency, and in the way of his business.

The case of Ford v. Hopkins was also cited: which was in Hil. 12 W. 3, coram Holt, Chief Justice, at Nisi Prius, at Guildhall; and was an action of trover for million-lottery tickets. But this must be a very incorrect report of that case: it is impossible that it can be a true representation of what Lord Chief Justice Holt said. It represents him as speaking of bank-notes, exchequer-notes, and million-lottery tickets, as like to each other. Now no two things can be more unlike to each other than a lottery-ticket and a bank-note. Lottery-tickets are identical and specific: specific actions lie for them. They may prove extremely unequal in value: one may be a prize; another, a blank. Land is not more specific than lotterytickets are. It is there said, "that the delivery of the plaintiff's tickets to the defendant, as that case was, was no change of property." And most clearly it was no change of the property: so far, the case is right. But it is here urged as a proof, "that the true owner may follow a stolen bank-note into whose hands soever it shall come."

Now the whole of that case turns upon the throwing in banknotes, as being like to lottery-tickets.

But Lord Chief Justice *Holt* could never say, "that an action would lie against the person who, for a valuable consideration, had received a bank-note which had been stolen or lost, and *bonâ fide* paid to him;" even though the action was brought by the true owner; because he had determined otherwise but two years before; and because bank-notes are not like lottery-tickets, but money.

The person who took down this case certainly misunderstood Lord Chief Justice *Holt*, or mistook his reasons. For this reasoning would prove (if it was true, as the reporter represents it), that if a man paid to a goldsmith 500*l*. in banknotes, the goldsmith could never pay them away.

A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured.

There was a case in the Court of Chancery, on some of Mr. Child's notes, payable to the person to whom they were given, or bearer. The notes had been lost or destroyed many years. Mr. Child was ready to pay them to the widow and administratrix of the person to whom they were made payable; upon her giving bond, with two responsible sureties (as is the custom in such cases), to indemnify him against the bearer, if the notes should ever be demanded. The administratrix brought a bill, which was dismissed, because she either could not or would not give the security required. No dispute ought to be made with the bearer of a cash note; in regard to commerce, and for the sake of the credit of these notes; though it may be both reasonable and customary to stay the payment, till inquiry can be made whether the bearer of the note came by it fairly or not.

Lord Mansfield declared that the court were all of the same opinion for the plaintiff; and that Mr. Justice Wilmot concurred. Rule — that the postea be delivered to the plaintiff.

The general rule of the law of England is, that no man can acquire a title to a chattel personal from any one who has himself no title to it, except only by sale in market-overt, Peer v. Humphrey, 2 Ad. & Ell. 595. [Nemo dat quod non habet, see Whistler v. Forster, 32 L. J. C. P. 161.]

The case of Miller v. Race, however, has established an exception in the case of negotiable instruments, the property in which will pass, like that in coin, along with the possession, when they have been put into that state in which, according to the usage and custom of trade, they are transferred from one man to another by delivery. This was again determined in Grant v. Vaughan, 3 Burr. 1516, in the case of a draft by a merchant on his banker; and in Gorgier v. Mieville, 3 B. & C. 45, in the case of a bond given by the King of Prussia, by which he declared himself and his successors bound to every person who should for the time being be the holder of the bond, and which was proved to be salable in the market, and (with other bonds of a like description) to pass from hand to hand at a variable price. [And in Symons v. Mulkern, 30 W. R. 875, bonds for French Rentes, payable to bearer, were held to be negotiable securities.] In the Attorney-General v. Bouwens, 4 M. & W. 171, the forms of several foreign securities accustomably transferable like cash in this country will be found. [See, however, as to this class of securities, Crouch v. Crédit Foncier of England, L. R. 8 Q. B. 374, where the court says (at p. 384), "foreign and colonial governments frequently create a public debt, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder. There can hardly properly be said to be any right of action on such instruments at all, though the holder has a claim on a foreign government." And at the same place, the court, after citing Attorney-General v. Bouwens and Gorgier v. Mieville, add, with regard to the latter

case: "We have no intention to throw the least doubt on this decision; but we do not think it applicable to an English instrument made in England; and we express no opinion as to what might be the law as to obligations made by subjects abroad, which, by the law of the country where they were made, are negotiable in that country." And in the judgment of Lord Selborne in the case of Goodwin v. Robarts, 1 App. Ca. 476, 45 L. J. Ex. 748, the distinction between foreign government securities and ordinary English contracts is again dwelt upon.

The reason for the distinction in the case of the bonds of a foreign government is tolerably plain because, as stated above, "there can hardly be said to be any right of action on such instruments at all," and therefore the transfer of the holder's right, whatever it is, can hardly be said to be governed by the ordinary rules as to the transfer of causes of action.

The distinction in this respect between the obligations of foreign and of English subjects is not so obvious, and it should be observed that the Court of Queen's Bench cautiously guard themselves against laying down any such distinction. It has been recently held by the Court of Appeal in Picker v. London and County Banking Co., Limited, 18 Q. B. D. 515, that Prussian Government Bonds which were not negotiable by the custom of this country could not be treated in our courts as negotiable securities, although they might be negotiable in Prussia.

Here it should be mentioned that the judgments of Lords Cairns and Hatherley followed by the decision in Rumball v. The Metropolitan Bank, 2 Q. B. D. 194, 46 L. J. Q. B. 346, impair to some extent, by means of the doctrine of estoppel, the importance of the rules which have been attempted to be laid down as to what will give, even to an English instrument, the quality of negotiability. These cases will be more fully treated below.]

See Lickbarrow v. Mason, 5 T. R. 683, post; Gurney v. Behrends, 3 E. & B. 633, per cur. [Pease v. Gloahec, L. R. 1 P. C. 219, 35 L. J. P. C. 66; Rodger v. The Comptoir d'Escompte de Paris, L. R. 3 P. C. 465; Henderson v. Same, L. R. 5 P. C. 253], 18 & 19 Vict. c. 111, respecting Bills of Lading. — Zwinger v. Samuda, 7 Taunt. 265; Lucas v. Dorrein, ibid. 278 [Johnson v. Crédit Lyonnais, 3 C. P. D. 32], 47 L. J. C. P. 241; as to Dock Warrants. - MacLae v. Sutherland, 3 E. & B. 1, as to a Promissory Note with coupons. — Brandao v. Barnett, in the Common Pleas, 1 M. & Gr. 909; 2 Scott, N. R. 96, in the Exchequer Chamber, 6 M. & Gr. 630; 7 Scott, N. R. 30, in the House of Lords, 12 Cl. & Fin. 787, as to Exchequer Bills. —Partridge v. Bank of England, Cam. Scacc. 2 Q. B. 396, as to Dividend Warrants. — [Keene v. Beard, 8 C. B. N. S. 372; Eyre v. Waller, 5 H. & N. 460; 29 L. J. Exch. 246; Serrell v. The Derbyshire Rail. Co., 9 C. B. 811; Whistler v. Forster, 32 L. J. C. P. 161; Watson v. Russell, 34 L. J. Q. B. 93; Hopkinson v. Forster, L. R. 19 Eq. 74; McLean v. Clydesdale Banking Co., 9 App. Cas. 95, as to Checks on Bankers. — Dixon v. Bovill, 3 Macq. H. of Lords C. 1, as to Iron Scrip Notes; Merchant Banking Co. v. Phænix Bessemer Steel Co., 5 Ch. D. 205, 46 L. J. Ch. 418, as to Iron Warrants. - In re Blakeley Ordnance Co., L. R. 3 Ch. 154, 37 L. J. Ch. 418; In re Natal Investment Co., L. R. 3 Ch. 355; 37 L. J. Ch. 362; In re General Estate Co., L. R. 3 Ch. 758; In re Imperial Land Co. of Marseilles, L. R. 11 Eq. 478; 40 L. J. Ch. 93; and Crouch v. Crédit Foncier of England, L. R. 8 Q. B. 374; 42 L. J. Q. B. 183, as to Debentures. — France v. Clark, 26 Ch. D. 264, as to Blank Transfers; and Fine Art Society v. Union Bank of London, 17 Q. B. D. 705, as to Post-office Orders.] See also Lang v. Smyth, 7 Bing. 284, the facts of which will presently be stated.

A negotiable instrument being clearly transferable by any person holding it,

so as by delivery thereof to give a good title "to any person honestly acquiring it," per Abbott, C. J., 3 B.& C. 47, the next question is, what instruments may with propriety be termed negotiable. And to this it may be answered, That whenever an instrument is such that the legal right to the property secured thereby passes from one man to another by the delivery thereof, it is, properly speaking, a negotiable instrument, and the title to it will vest in any person taking it bonâ fide, and for value, whatever may be the defects in the title of the person transferring it to him. An instrument is called negotiable when the legal right to the property secured by it passes by its delivery, because, although an instrument may be salable in the market, and treated in many respects like cash, yet, if by a transfer of it nothing pass but a right to sue on it in the name of the transferor or original party to it, such an instrument is not properly speaking negotiable.

Thus in Glynn v. Baker, 13 East, 509, an India bond was held not to be a negotiable instrument (there being then no act equivalent to 51 G. 3, c. 64, s. 4, which afterwards rendered India bonds negotiable). In that case the plaintiff and the defendant had lodged their respective India bonds with the same bankers, who improperly sold the defendant's bonds, and on his demand delivered to him those of the plaintiff to the same amount, and payable to the same obligee, viz., W. G. Sibley; the defendant, not knowing that the bonds handed to him were not his own, afterwards sold them, and received the proceeds. It was held that the plaintiff might recover the amount from him in an action for money had and received; see Williamson v. Thompson, 16 Ves. jun. 443.

In Gorgier v. Mieville, 3 B. & C. 45, this case was cited, and relied on as an authority against the negotiability of the King of Prussia's bond; but Abbott, C. J., said that the case was distinguishable from Glynn v. Baker. "There," said his lordship, "it did not appear that India bonds were negotiable, and no other person could have sued on them but the obligee. Here, on the contrary, the bond is payable to the bearer, and it was proved at the trial that bonds of this description were negotiated like exchequer bills." [And see the case of Gorgier v. Mieville explained in Crouch v. Crédit Foncier of England, cited ante, p. 502, in which case also the following rule is cited with approbation, though the decision in Crouch v. Crédit Foncier of England, as will be seen hereafter, has been to some extent shaken, if not overruled, by the judgment of the Exchequer Chamber, in Goodwin v. Robarts, L. R. 10 Ex. 337, 44 L. J. Ex. 57, 157, confirmed in Dom. Proc. 1 App. Cas. 476, 45 L. J. (H. L.) 748, and followed by Rumball v. Metropolitan Bank, 2 Q. B. D. 194, 46 L. J. Q. B. 346.]

It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable [in this country], like cash, by delivery, and is also capable of being sued upon by the person holding it pro tempore, there it is entitled to the name of a negotiable instrument, and the property in it passes to a bonâ fide transferee for value, though the transfer may not have taken place in market-overt. But that if either of the above requisites be wanting, i.e., if it be either not accustomably transferable, or, though it be accustomably transferable, yet if its nature be such as to render it incapable of being put in suit by the party holding it pro tempore, it is not a negotiable instrument, nor will delivery of it pass [otherwise than by estoppel (as to which, see Goodwin v. Robarts, in Dom. Proc. sup.)] the property of it to a vendee, however bonâ fide, if the transferor himself have not a good title to it, and the transfer be made out of market-overt.

To illustrate these propositions, bills and notes payable to bearer, or payable to order and indorsed in blank, are beyond all doubt negotiable instruments in the full sense of those words, Solomons v. Bank of England, 13 East, 135,

Grant v. Vaughan, 3 Burr. 1416; Collins v. Martin, 3 B. & P. 649; Peacock v. Rhodes, Dougl. 636; Wookey v. Pole, 4 B. & A. 1 [Theidemann v. Goldschmidt, 1 Giff. 142, reversed on appeal, 1 De G. Fish. & J. 4]; for they are both accustomably transferable like cash, and are also capable of being sued on by the holder pro tempore. But if such a bill be especially indorsed, its negotiability [in the full sense of the word] is at an end, for it becomes thereby incapable of being sued upon by any one except the special indorsee [until indorsed away by him], Sigourney v. Lloyd, 8 B. & C. 622, 5 Bing. 525; Archer v. Bank of England, Dougl. 639; Treuttel v. Barandon, 8 Taunt. 100.

[The last cited cases deal with what are called restrictive indorsements, as to which the Bills of Exchange Act, 1882, by s. 35, now provides that "an indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof."

It may here be noted with regard to bankers' checks that a custom has sprung up of crossing them with a view of rendering them payable only through a banker, which custom has been recognized by the legislature, and embodied in the Bills of Exchange Act, 1882, ss. 76–82, reënacting, with some alteration, the enactments on the subject contained in 19 & 20 Vict. c. 25, 21 & 22 Vict. c. 79, and 39 & 40 Vict. c. 81, all of which last-mentioned acts are now repealed.

In the cases of Bellamy v. Marjoribanks, 7 Ex. 389, and Carlow v. Ireland, 5 E. & B. 765, decided before the above acts, it was held that such crossing did not impair the negotiability of the check, so that a bonâ fide holder for value, though not a banker, could make a good title to a check though crossed. It was further held that the passing of the Acts 19 & 20 Vict. c. 25, and 21 & 22 Vict. c. 79, did not restrain the negotiability of such an instrument, Smith v. Union Bank, 1 Q. B. D. 31, 45 L. J. Q. B. 149, and notwithstanding some dicta of Lindley, L. J., tending to the contrary in Matthiessen v. London and County Bank, 5 C. P. D., at p. 16, it is submitted that the effect of the present statute is the same, provided that the check is merely crossed with the words "and company," or with the name of a banker, without the addition of the words "not negotiable."

But by the Bills of Exchange Act, 1882, ss. 76, 77 (reënacting in this respect certain sections of 39 & 40 Vict. c. 81), it is provided that to the crossing of a check may be added the words "not negotiable," in which case the taker of the check "shall not have and shall not be capable of giving a better title to the check than that which the person from whom he took it had" (s. 81).

It may further be noted that for the protection of bankers a special negotiability, so to speak, has been by statute given to checks when dealt with by them.

Thus by 16 & 17 Vict. c. 59, s. 19, it is provided "that any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof." But the above section only protects the banker on whom the check is drawn, Oyden v. Benas, L. R. 9 C. P. 513; 43 L. J. C. P. 259].

And by s. 82 of the Bills of Exchange Act, 1882, it is provided that "where a banker in good faith and without negligence receives payment for a customer of a check crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the

true owner of the check by reason only of having received such payment." See as to this *Matthiessen* v. *London and County Bank*, 5 C. P. D. 7; 48 L. J. C. P. 529, decided on the section 12 in pari materià of 39 & 40 Vict. c. 81.]

In Glynn v. Baker [13 East, 509], the court appears to have been of opinion that even had the jury expressly found the India bond to be negotiable, and to pass accustomably by delivery, it would not have been so in contemplation of law. "If it be meant," said Lord Ellenborough, "to liken this to the case of bankers' notes, in Miller v. Race, as having acquired in fact a negotiable quality, and being received as cash, or to ordnance debentures, notes, bills, and other securities of the same description, which are circulated daily in the money market, the fact of such negotiability should be stated. But supposing it were so stated, how could a right of action be made to pass on these securities by such a practice to the holder of them, where by law no such right passes? There must always be that impediment existing to the legal negotiability of such instruments which distinguishes them from bills of exchange, and securities of that nature, in which the legal interest passes, under the law merchant, by indorsement and delivery to another." Taddy, Serg., cited a case of Maclish v. Ekins, to the same point, a short note of which is to be found, 13 East, 515. See, also, Taylor v. Kimer, 3 B. & Ad. 321, and Taylor v. Trueman, 1 M. & M. 453 (which were, however, decided on the construction of 6 G. 4, c. 94); the conclusion of Baron Parke's judgment in Hibblewhite v. M'Morine, 6 M. & W. 216; his remarks in Daly v. Thompson, 10 M. & W. 318; and the expressions of Ashurst, J., 2 T. R. 71 [Dixon v. Bovill, 3 Macq. H. of L. C. 1] and post. It is submitted, therefore, as at least probable, that if the right of suing on an instrument should not appear upon the face of it to be extended beyond one particular individual, no usage of trade, however extensive, would be allowed by the courts (at least in the case of an English instrument) to confer upon it the character and incidents of negotiability. Accord. Partridge v. Bank of England, 9 Q. B. 396, which see as to dividend warrants [and which on the above point is followed and approved in Crouch v. Crédit Foncier of England, L. R. 8 Q. B. 374, 42 L. J. Q. B. 183].

It is, however, right to mention that there is a case of Renteria v. Ruding, 1 M. & M. 511, which seems, at first sight, to militate against this doctrine. In that case the plaintiff signed a bill of lading for goods shipped in Spain, by Bernardo Echeluce, to be delivered in London, to Messrs. O'Brien, on being paid freight, primage, and average: there was no mention of assigns in the bill of lading. The defendants having received the goods, and being sued for freight, Brougham argued that the bill not being assignable by indorsement, they were not liable. A witness was then called, who proved that bills of lading from Spain were frequently in the same form, and were nevertheless treated as assignable by indorsement. Lord Tenterden, after referring to the Treatise on Shipping, page 286, 5th edition, and reading, "for if a person accept anything which he knows to be subject to a duty or charge, it is natural to conclude he means to take the duty or charge on himself, and the law may very well imply a promise to perform what he so takes upon himself," said, "this seems to me to be the correct principle, and the omission of the words or their assigns makes no difference."

Now, if Renteria v. Ruding be taken to prove that a bill of lading omitting the word assigns is nevertheless assignable, so as to pass the legal right in the goods to the indorsee, it certainly does appear to militate against the doctrine above contended for, and seems also contrary to the opinion expressed by Ashurst, J., in Lickbarrow v. Mason, 2 T. R. 71; where his lordship says, "The assignee of a bill of lading trusts to the indorsement; the instrument is

in its nature transferable in this respect; therefore, it is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only, but he has made it an indorsable instrument." [The case too of Henderson v. The Comptoir d'Escompte de Paris, L. R. 5 P. C. 253, is to some extent an authority in the Privy Council, for the proposition that a bill of lading making the goods deliverable to L. S. & Co. without adding the words, "or order or assigns," is not negotiable even by L. S. & Co., differing in this respect from a bill of exchange, Edie v. East India Co., 2 Burr. 1216, Bills of Exchange Act, 1882, s. 8, sub-s. 4.]

But if Renteria v. Ruding be taken only to show that the delivery up of the goods to the defendants was a sufficient consideration to support a promise on their part to pay the freight, &c., and that such a promise might be implied from their knowledge that the goods they accepted were subject to those charges, the case will be distinguishable, and will be similar to that of Williams v. Leaper, 3 Burr. 1886, where the defendant, a broker, being about to sell the goods of A., for the benefit of his creditors, the plaintiff, A.'s landlord, came to distrain them; upon which the broker promised to pay the rent, if the landlord would permit him to retain and sell the goods; the consideration was held sufficient, and the promise binding. In Williams v. Leaper, therefore, the landlord's relinquishment of his lien on the goods for rent was a sufficient consideration to support a promise by a party not being the owner of the goods, but who obtained possession of them by the landlord's relinquishment of his lien, to pay the charge upon them for rent: and pari ratione, in Renteria v. Ruding, the master's relinquishment of his lien on the goods for freight was a sufficient consideration to support a promise by the defendants, who obtained possession of the goods by the captain's relinquishment of his lien, to pay the charge upon them for freight; and the passage of his work referred to by Lord Tenterden shows that such a promise may be implied; and though Scaife v. Tobin, 3 B. & Ad. 523 (which, however, is subsequent to Renteria v. Ruding), decides that a person who is not the owner of goods does not by the mere receipt of them, with the knowledge that they were subject to a charge, bind himself to pay it; yet, it is there laid down by Lord Tenterden, that if such a person receive the goods in pursuance of a bill of lading making the payment of such charge a condition precedent to the delivery of the goods, or if he have notice from the master that if he take the goods he must take them subject to the charge, he will be liable.

Now, in Renteria v. Ruding, the defendants claimed to receive the goods by virtue of the bill of lading, which made the payment of freight, &c., a condition precedent to the delivery. And though they might not be, properly speaking, indorsees of the bill; still as they exhibited it, and claimed to receive the goods in pursuance of it, they might fairly be taken to have assented to its terms, so that a promise to pay the charge therein imposed might be implied. See the note to Lickbarrow v. Mason, post [Moeller v. Young, 5 E. & B. 7; in error, ibid. 755; and as to demurrage, Smith v. Sieveking, in error, 5 E. & B. 589].

Further—although an instrument may contain nothing on the face of it inconsistent with the character of negotiability, still, if it be not accustomably transferable in the same manner as cash, it will not be looked upon as a negotiable instrument. Thus in Lang v. Smyth [7 Bing. 284] a question arising whether certain instruments called bordereaux and coupons, which purported to entitle the bearer to portions of the public debt of the kingdom of Naples, were negotiable instruments; the jury having found that they did not usually pass from hand to hand like money; that finding was held conclusive to show that they were not negotiable instruments.

Whether an instrument which has never been solemnly recognized by the law as negotiable be accustomably transferable by delivery, or not, is a question which must in each case be left to the determination of a jury. [Crouch v. Crédit Foncier of England, L. R. 8 Q. B. 374, 42 L. J. Q. B. 183.] It was submitted to the jury in Lang v Smyth, and held to have been rightly so.

It seems to have been thought in Lang v. Smyth, that if a question were to arise respecting the negotiability of a foreign instrument, and it were shown not to be negotiable in the country where it was made, the fact of its accustomably

passing like cash in this country would not make it negotiable.

"These," said Tindal, C. J., "are not English instruments, recognized by the law of England, but Neapolitan securities brought to the notice of the court for the first time, and as judges we are not allowed to form an opinion on them unless supplied with evidence as to the law of the country whence they come. Judges have only taken upon themselves to decide the nature of instruments recognized by the law of this country, as bills of exchange, which pass current by the law merchant, dividend warrants, or exchequer bills, the transfer of which is founded on statutes, which a judge in an English court is bound to know. It has been urged that in Gorgier v. Mieville, the case of the Prussian bonds, no evidence was given of the foreign law. But evidence was given, that, by the usage of merchants in this country, those bonds passed from hand to hand, which usage could have scarcely existed unless they were negotiable in Prussia, so that evidence as to the law of Prussia was rendered unnecessary. And the question is not so much what is the usage in the country whence the instrument comes, as in the country where it has passed." The rule to be collected from this seems to be that a foreign instrument is not negotiable here, unless negotiable where it was made; but that evidence that it is accustomably transferable from hand to hand in this country, is primâ facie evidence that it also is so abroad.

[But, further, it has been decided by high authority (though the decision has, it will be seen, been shaken) that an English instrument, though it may contain nothing on the face of it inconsistent with the character of negotiability, and though it be found by the jury to be at the present day accustomably transferable in the same manner as cash, still cannot, either by usage or by express stipulation of the parties, be made to have the quality of negotiability: that this quality it can have only by the ancient law merchant (distinguished from a mere custom of trade), as in the case of bills of exchange, and of checks, Keene v. Beard, 8 C. B. N. S. 372, or by statute, as in the case of East India bonds under 51 G. 3, c. 64, s. 4.

Such would seem to be the effect of the judgment in the important case of Crouch v. The Crédit Foncier of England, L. R. S. Q. B. 374, 42 L. J. Q. B. 183, already cited. In that case the defendants had issued an instrument under the seal of the company, countersigned by two directors and the secretary, called on the face of it a debenture, whereby the company promised, subject to certain conditions indorsed thereon, which deprived it of the character of a promissory note, to pay to the bearer 100l. and also certain interest and bonuses. This was issued to one Macken, from whom it was stolen, and it was afterwards assigned to the plaintiff, who received it bonâ fide for value without notice of the theft. The company, on the indemnity of Macken, declined to pay the debenture, whereupon the plaintiff brought this action. At the trial at Nisi Prius it was tacitly admitted, that as a matter of fact similar documents are in practice treated as negotiable, and a verdict was found for the plaintiff; but a rule obtained subsequently pursuant to leave reserved to enter the verdict for the defendants was made absolute.

The Court was sedulous to confine their judgment to the case before them,

which was that of an English instrument made by an English company in England. In their judgment they point out that the form of the instrument shows that the company contracted with Macken to pay the bearer. But while admitting that the company were competent to make any stipulation with Macken that would affect their rights and his only (p. 385 of L. R.), the court go on tosay (at p. 386 of L. R.): "There is no decision or authority that it is competent to a party to create by his own act a transferable right of action on a contract. It is enough to refer to Dixon v. Bovill, 3 Macq. 1, and Thompson v. Dominy, 14 M. & W. 403, as authorities that he cannot, irrespective of custom, so create it. We have only further to consider whether the custom or practice of trade to treat such instruments as negotiable makes any difference. We must take it as admitted (whether truly or not, we know not) that such a custom has prevailed of late years; but as the instruments themselves are only of recent introduction, it can be no part of the law merchant. Incidents which the parties are competent by express stipulation to introduce into their contracts may be annexed by custom, however recent, provided that it be general, on the ground that they are tacitly incorporated in the contract. If the wording of an instrument is such as to exclude this tacit incorporation, no usage can annex the incident. But where the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage. It may be so annexed by the law merchant, which forms part of the law, and of which the courts take notice. Nor if the ancient law annexes the incident, can any modern usage take it away." After citing Edie v. East India Co., 2 Burr. 1216, and Partridge v. Bank of England, 9 Q. B. 396, for the latter proposition, the court concludes: "We have already intimated our opinion that it is beyond the competency of the parties to a contract by express words to confer on the assignee of that contract a right to sue in his own name. And we also think it beyond the competency of the parties by express stipulation to deprive the assignee of either the contract or the property represented by it of his right to take back his property from any one to whom a thief may have transferred it even though that transferee took it bond fide and for value. As these stipulations, if express, would have been ineffectual, the tacit stipulations implied from custom must be equally ineffectual."

But in Goodwin v. Robarts, L. R. 10 Ex. 356; 44 L. J. Ex. 57, 157, Cockburn, C. J., in delivering the judgment of the Court of Exchequer Chamber, says, "We think the judgment in Crouch v. The Crédit Foncier may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called 'the ancient law merchant." With regard to the lack of proof of general usage in Crouch v. The Crédit Foncier, it may be observed that the usage in that case, though not proved, was taken as admitted, which would, it is submitted, amount to the same thing. Further, as the Court of Queen's Bench carefully confine their judgment to the case before them, which was one of an English instrument made by an English company in England, whereas the instrument before the court in Goodwin v. Robarts was scrip of a foreign government, the above remarks of Cockburn, C. J., might be treated as obiter dicta of great weight rather than as an actual decision with regard to English instruments. In the judgment in Goodwin v. Robarts, in the House of Lords, 1 App. Cas. 476, no opinion in terms was expressed with regard to the correctness in this respect of the judgment in Crouch v. The Crédit Foncier, though Lord Selborne is careful to confine his judgment to the case of securities created or given by a foreign government.

The effect of the decision of Goodwin v. Robarts in the House of Lords, and Rumball v. Metropolitan Bank, would seem to be that on the ground of estoppel (a subject which is treated at length in the notes to the Duchess of Kingston's Case, post, vol. ii.), a person who deposits with an agent a security on the face of it payable to bearer, is liable to a bonâ fide holder for value, in case the agent fraudulently puts it in circulation, whether it be negotiable or not, though Lord Selborne, in his judgment in France v. Clark, 26 Ch. D. 264, treats the evidence of mercantile usage as being essential to the decision in Goodwin v. Robarts, and in Fine Art Society v. Union Bank of London, 17 Q. B. D., at p. 710, expresses the opinion that the rule as stated by the House of Lords must be confined "to the facts of the special case, which contained a statement that the form of instrument then in question had been treated as a negotiable instrument by the mercantile world and by all parties dealing with it."

In the case of Goodwin v. Robarts, the plaintiff claimed damages for the conversion by the defendants of the scrip of certain loans to the Russian and Hungarian Governments, which scrip had been deposited by the plaintiff with his broker, to be disposed of as the plaintiff might think fit, and by the broker been fraudulently pledged with the defendants, who took the scrip bonâ fide and for value. By the scrip the respective governments undertook to give to the bearer bonds in respect of loans issued by them; and it was held by Lords Cairns and Hatherley that the plaintiff was estopped from denying the title of the defendants whether the scrip had the quality of negotiability or not: though they also decided that the scrip had that quality on the authority of Gorgier v. Mieville, 3 B. & C. 45, Lord Selborne concurring upon the latter ground.

In Rumball v. The Metropolitan Bank, 2 Q. B. D. 194, 46 L. J. Q. B. 346, where the securities in question were scrip certificates of an English Company, Crouch v. The Crédit Foncier would seem to be treated as overruled by the judgment of the Court of Exchequer Chamber in Goodwin v. Robarts, though Rumball v. The Metropolitan Bank may be supported on the other ground of estoppel, on which the court also rely. See upon the doctrine of estoppel, Crouch v. Crédit Foncier, at p. 385 of the L. R., and also Merchant Banking Co. v. Phænix Bessemer Co., 5 Ch. D. 205; France v. Clark, 26 Ch. D. 257; Fine Art Society v. Union Bank of London, 17 Q. B. D. 705.

Here it may be observed that the common-law rule by which a chose in action is not assignable at law has been broken in upon by the Judicature Act, 1873, 36 & 37 Vict. c. 66, which provides by sec. 25, subs. 6, that "any absolute" (Burlinson v. Hall, 12 Q. B. D. 347, 53 L. J. Q. B. 222) "assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the consent of the assignor." See on this section Schroeder v. Central Bank of London, 24 W. R. 710; Brice v. Bannister, 3 Q. B. D. 569; Buck v. Robson, 3 Q. B. D. 686; Walker v. Bradford Old Bank, 12 Q. B. D. 511, 53 L. J. Q. B. 280; Ingle v. M'Cutchan, 12 Q. B. D. 518, 53 L. J. Q. B. 311.

A point of some importance has been raised but not decided as to the negotiability of instruments in form promissory notes, but which being under the seal of a corporation are primâ facie covenants, and therefore not negotiable.

In Crouch v. The Crédit Foncier of England (at p. 382 of L. R.) the court says: "It is quite clear that a covenant to pay money is not negotiable by the custom of merchants. . . . The negotiability of promissory notes depends in part at least upon the statute of 3 & 4 Anne, c. 9; and it seems to have been the opinion of Lord Justice Wood, in Re General Estates Co. (L. R. 3 Ch., at p. 762) and of Malins, V. C., in Re Imperial Land Co. of Marseilles, L. R. 11 Eq., at p. 490, that inasmuch as that Act enacts that promissory notes in writing 'made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him or them to sign such promissory notes for him, her, or them, whereby such person or persons, body politic or corporate, his, her, or their servant or agent, doth promise to pay any sum of money, shall be indorsable as bills of exchange are by the custom of merchants;' it follows that a corporation fixing its seal to a written promise to pay must be considered as signing the promise, not as covenanting under seal to fulfil it; and so, that the statute by implication enacts that what would at common law be their covenant to pay is their promise. But although intimating their opinion, neither of the learned persons referred to gave any decision on the point, as it was not necessary for the purpose of the cases before them." The Court of Queen's Bench for like reasons decline to decide the question, but point out that in Glyn v. Baker, Le Blanc, J., takes a view opposed to that of the learned persons whose opinion is above cited.

A railway company cannot, and it would seem that no corporation, except a trading corporation, or one having special powers for that purpose by statute or by its articles of incorporation, can accept bills of exchange or make promissory notes. Bateman v. Mid-Wales Rail. Co., L. R. 1 C. P. 499, 35 L. J. C. P. 205; In re General Estates Co., Ex parte City Bank, L. R. 3 Ch. 758, and see Bills of Exchange Act, 1882, s. 22.]

One class of cases in which the negotiability of an instrument becomes important, is where a question arises whether, upon the holder's death, it be subject to probate duty. Now, as the [liability to probate duty] depends on the locality of the [assets at the testator's death, Attorney-General v. Pratt, L. R. 9 Ex. 140, 43 L. J. Ex. 108], it has been held that French rentes, American stock, and debts due from a foreigner, being transferable abroad only, must be considered as locally situate abroad, and, consequently, as exempt from probate duty; but that foreign bills and bonds, given by the Russian, Dutch, and Prussian governments, accustomably salable in the market here are chattels in this country liable to probate duty, although the dividends upon the Dutch bonds were payable solely at Amsterdam. Attorney-General v. Bouwens, 4 M. & W. 171; Attorney-General v. Hope, 1 C. M. & R. 530, [2 Cl. & F. 84]; 8 Bligh, 44; Attorney-General v. Dimond, 1 C. & J. 356 [Pearse v. Pearse, 9 Sim. 430].

It has thus been endeavored to deduce some rules whereby to ascertain when a particular instrument is or is not negotiable. When once decided to be negotiable, it becomes, as has been already stated, exempted from the ordinary rule respecting chattels personal, and property in it may be transferred by a man who has none in it himself, to a person taking it bonâ fide, and for a good consideration. Grant v. Vaughan, 9 Burr. 1516; Collins v. Martin, 1 B. P. 648; Wookey v. Pole, 4 B. & A. 1; Peacock v. Rhodes, Dougl. 636; Lawson v. Weston, 4 Esp. 56; Snow v. Saddler, 3 Bing. 610. But a party who has not taken it bonâ fide, and for good consideration, will not be permitted to retain it: for it stands on the same footing as money, except that it is much more easily identified, and money itself could not be retained under those circumstances.

This was decided in Clarke v. Shee, Cowp. 197, where the plaintiff's clerk re-

ceived notes and moneys for his master, and laid them out with the defendant in illegal insurances of lottery tickets; the master, being able to prove their identity, was held entitled to recover them. "When money or notes," said Lord Mansfield, "are paid bonâ fîde, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come malâ fîde into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover."

Such being the principle, the contest in each particular case has ever since been whether the circumstances under which the negotiable instrument has passed to the party claiming to hold it, afford evidence of mala fides so as to bring the case within the latter part of the rule laid down in Clarke v. Shee, by Lord Mansfield. Now it was very early held that there might be on the part of a person taking a negotiable instrument, negligence of such a description, and so gross, as would afford cogent evidence of mala fides; in other words, as would satisfy any reasonable man that the party guilty of it must, or ought to, have suspected that the dealing in which he was engaged was tainted with fraud. This was laid down in Solomons v. The Bank of England, 13 East, 135. But the case which has, perhaps, gone furthest on the subject, is Gill v. Cubitt, 3 B. & C. 466 fin which casel the Lord Chief Justice left it to the jury whether the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man. If they thought he had, they were to find a verdict for the defendant. The jury found for the defendant, and a new trial being moved for was refused.

[This case] has been the one usually most relied on by persons seeking to invalidate the transfer of a bill, on the ground of want of caution in taking it. It was followed by Snow v. Peacock, 3 Bing. 408; Down v. Halling, 4 B. & C. 330; Slater v. West, Dans. & Lloyd, 15; Beckwith v. Corrall, 4 Bing. 444; Strange v. Wigney, 6 Bing. 677; Easly v. Crockford, 10 Bing. 243.

Gill v. Cubitt [however] may now [no doubt] be considered as virtually overruled. See the judgment of the Court of Exchequer, in Foster v. Pearson, 5 Tyrwh. 262 [and Crook v. Jadis, 5 B. & Ad. 909; Backhouse v. Harrison, 5 B. & Ad. 1098; London and County Banking Co. v. Groome, 8 Q. B. D. 288]. In Goodman v. Harvey, 4 A. & E. 870, the Court of Queen's Bench ruled that there must be actual mala fides, and that the existence of gross negligence even was unimportant, except so far as it might be evidence of mala fides. And in Uther v. Rich, 10 A. & E. 784, the Court adhered to the decision in Goodman v. Harvey, and held that mala fides in the holder of a negotiable security, if relied on, must be distinctly alleged; that the only proper mode of implicating him in an alleged fraud is by averring that he had notice of it, and that an allegation that he was not a bona fide holder is not equivalent to an averment of such notice. And in the Bank of Bengal v. M'Leod, 7 Moore, P. C. 35, the judicial committee stated broadly that the rule acted upon in Gill v. Cubitt, and Down v. Halling, was not law.

[Further, in Raphael v. The Bank of England, 17 C. B. 161, an action upon a bank-note which had been stolen, the jury having found, in answer to questions put by Jervis, C. J.. — first, that the real plaintiffs had given full value for the note, secondly, that they had had notice of the felony, thirdly, that they had no knowledge at the time they took the note that it had been stolen, but had the means of knowledge if they had taken proper care, lastly, that they had taken the note bonâ fide, — his lordship directed the verdict to be entered for the plaintiffs, and afterwards the court refused to allow a rule nisi for a new trial, moved for on the ground that the plaintiffs on the finding were not entitled to the verdict. In that case, Willes, J., concurred in the opinion given by Parke,

B., in May v. Chapman, 16 M. & W. 355, that "notice and knowledge" means not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes, — a suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded. See also the direction of Byles, J., in Oakley v. Ooddeen, cited Byles on Bills, 14th ed., p. 144, notes (q) and (s), reported 2 F. & F. 656; and see Monteflore v. Browne, 7 H. of L. Ca. 255, 262; Carlow v. Ireland, 5 E. & B. 765.

The question is thoroughly discussed in the House of Lords in the case of Jones v. Gordon, 2 App. Cas. 616, where the holder was held by wilfully shutting his eyes to have disentitled himself, though he gave some value. See especially the judgment of Lord Blackburn, at p. 628 of the L. R.: - "I think it is right," says his lordship, "to say that I consider it to be fully and thoroughly established that if value be given for a bill of exchange it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong when there were circumstances which might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action on a bill of exchange. I take it that in order to make such a defence . . . it is necessary to show that the person who gave value for the bill, whether the value given be great or small, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. . . . But then I think that such evidence of carelessness or blindness, as I have referred to, may, with other evidence, be good evidence upon the question, which, I take it, is the real one, whether he did know that there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange, or a bank-note, when he ought not to have taken it, still he would be entitled to recover; but if the facts and circumstances are such that the jury, or whoever has to try the question, come to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind, I suspect there is something wrong, and if I ask questions and make further inquiry, it will no longer be suspecting it, but my knowing it, and then I shall not be able to recover - I think that is dishonesty." See also per Fry, J., Symons v. Mulkern, 30 W. R. 875.

By the Bills of Exchange Act, 1882, s. 90, it is provided that "a thing is deemed to be done in good faith within the meaning of that Act where it is in fact done honestly, whether it is done negligently or not."

Evidence of fraud on the part of a previous holder raises a presumption that the plaintiff is agent for that holder without value, and therefore casts on him the burthen of proving that he gave value, Hall v. Featherstone, 3 H. & N. 284. Whether it shifts the onus upon him to show that he gave value $bon\hat{a}$ fide, so that, although he gave value, he must give some affirmative evidence to show that he was doing it honestly, quære, see per Lord Blackburn in Jones v. Gordon, 2 App. Cas. at p. 628. Notice of fraud given after delivery of a bill payable to order, and before formal indorsement, affects the indorsee, Whistler v. Forster, 32 L. J. C. P. 161.

Questions have arisen as to the negotiability of instruments stolen and fraudulently put into circulation either after an attempted cancellation or before issue by the alleged maker. See *Ingham* v. *Primrose*, 7 C. B. N. S. 82, 28 L. J. C. P. 294; *Baxendale* v. *Bennett*, 3 Q. B. D. 825, 47 L. J. C. P. 624; also as to the validity of documents purporting to be acceptances where the acceptor had

signed his name to an instrument or paper, wholly or in part in blank, and which had been filled up contrary to his authority, see *Hogarth* v. *Latham & Co.*, 3 Q. B. D. 643; *L. & S. W.Bank* v. *Wentworth*, 5 Ex. D. 96, 49 L. J. Ex. 657; *Garrard* v. *Lewis*, 10 Q. B. D. 30. But as the law on this subject is now very fully dealt with by the Stat. 45 & 46 Vict. c. 61, ss. 20, 21, passed since the date of these decisions, it is not deemed necessary to discuss them, although they are of course still of authority as regards negotiable securities other than bills of exchange and promissory notes, with which alone that act deals.

On the latter point the law is thus laid down by Lord Selborne in France v. Clark, 26 Ch. D. at p. 262. "The person," says his lordship, "who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in a way not exfacie fraudulent) as against a bonâ fide holder for value without notice; but it has been repeatedly explained that this estoppel is in favor only of such a bonâ fide holder; and a man who, after taking it in blank, has himself filled up the blanks in his own favor without the consent or knowledge of the person to be bound, has never been treated in English courts as entitled to the benefit of that doctrine. He must necessarily have had notice that the documents required to be other than they were when he received them, in order to pass any other or larger right or interest, as against the person whose name was subscribed to them, than the person from whom he received them might then actually and bonâ fide be entitled to transfer or to create; and if he makes no inquiry he must at the most take that right (whatever it may happen to be) and nothing more. He cannot, by his own subsequent act, alter the legal character, or enlarge in his own favor the legal or equitable operation, of the instrument."

The holder of a negotiable instrument may effectually indorse it to a third person without consideration, merely for the purpose of enabling the latter to sue upon it on his, the indorser's, behalf, Law v. Parnell, 7 C. B. N. S. 282; Ancona v. Marks, 7 H. & N. 686, 31 L. J. Exch. 163.

An opinion has been entertained that the effect of 24 & 25 Vict. c. 96, s. 100, coupled with the decision in *Scattergood* v. *Sylvester*, 15 Q. B. 506, was to revest in the true owner the property in a stolen negotiable instrument on the conviction of the thief, even though it might have passed into the hands of a bonâ fide indorsee for value. In the case, however, of *Chichester* v. *Hill*, 52 L. J. Q. B. 160, it was decided that the statute has not this effect.]

1. Negotiable Instruments.

Origin of bills, notes, etc. — Bills of exchange had their origin in the custom of merchants; promissory notes were made negotiable by statute (3 & 4 Anne cap. IX. §§ 1-3) soon after the decision of Lord Holt in Buller v. Crips, 6 Mod. 29, in which a distinction was made between promissory notes and inland bills of exchange. A check is "a bill of exchange, payable at a banker's" (Sir G. Jessel, in Hopkinson v. Forster, L. R. 19 Eq. 74), though governed by laws and customs peculiar to itself.

Certificates of deposit and certified checks are of recent invention; they are regarded by the court as equivalent, in most respects, to promissory notes, and negotiable in like manner. It is not intended in this note, which will be confined to the peculiar negotiable character of commercial paper, by which it is distinguished from all other obligations, to consider the formal requisites of such instruments. If the formal requisites are complied with, and the proper negotiable words are employed, the law merchant endues the instrument with the property of negotiability. All negotiable instruments are divided into two classes, which on principle would seem to be radically distinct from one another: 1st, When they are drawn payable to order; 2d, When they are drawn payable to bearer. Negotiable paper drawn payable to order, but subsequently indorsed in blank, stands upon the same footing as paper payable to bearer, and that too although there be a subsequent special indorsement; Smith v. Clark, Peake 225; Walker v. MacDonald, 2 Ex. 527; Savannah Bank v. Haskins, 101 Mass. 370; Howry v. Eppinger, 34 Mich. 29; Watervleit Bank v. White, 1 Den. 608; Pentz v. Winterbottom, 5 Den. 51; French v. Barney, 1 Ired. 219; Rand v. Dovey, 83 Penn. St. 280.

When drawn payable to order. - First, As to paper drawn payable to order, any person to whom it has been indorsed in accordance with the custom of merchants, acquires a legal title to the instrument, and may enforce in a court of law, in his own name, all the rights which accrued originally to the payee. But the law merchant has gone further, and has impressed upon such paper another quality, which constitutes its very essence, and which establishes the true distinction between the assignment of an ordinary chose in action and the indorsement of a bill of exchange or promissory note. In order to facilitate their transfer, and in the interest of trade and business, it has always been held that the indorsee of negotiable paper before maturity, who has paid value for it in the ordinary course of business, not only acquires all the rights of the original holder, which he may enforce in his own name, but takes the paper discharged of many defences which the maker or acceptor could have set up in a suit brought by the payee. Such defences are called personal, or equitable defences, and include fraud, duress, want of or failure of consideration, illegality, and premature payment. See Gee v. Saunders, 66 Tex. 333 (1886); Crampton v. Perkins, 65 Md. 22 (1886); Green v. Bickford, 60 N. H. 159 (1884); Proctor v. Baldwin, 82 Ind. 370 (1882); Farmers & Mechanics Bank v. Butler, 68 Mich. 192 (1882). The common law and statutory defences, sometimes called real defences, on the other hand, may be set up by the maker or acceptor even as against an innocent purchaser for value. Such defences are infancy, coverture, insanity, and extreme intoxication (by the great weight of authority), usury and a gaming consideration (when such paper is made absolutely void by statute), cancellation, and a material alteration. But see infra as to estoppel. In the case of negotiable paper drawn payable to order, the holder to whom it has been duly indorsed acquires a good legal title ipso facto, by virtue of the indorsement itself. fact of his being a purchaser for value without notice, is only material in so far that it will defeat any personal, or equitable, defence which may be set up by the maker or acceptor.

When drawn payable to bearer. — Second, As to negotiable paper drawn payable to bearer, or which, having been originally drawn payable to order, is subsequently indorsed in blank, the bonû fide holder for value of such paper is protected against the personal defences of the maker, and in this respect the two classes of paper stand upon precisely the same footing. Paper drawn payable to bearer, however, having the peculiar property of negotiability by delivery, differs radically from paper payable to order, in that a purchaser for value, without notice, may acquire a legal title to it from one who has himself no title. Here the fact of his being a purchaser for value without notice is essential to his legal title to the paper, not merely an answer to some equitable defence of the maker; and such a holder takes the paper not only discharged of such equitable defences, but also discharged of the legal rights of any previous holder. Negotiable paper payable to bearer, by the custom of merchants, has thus been clothed with the peculiar attributes of currency or money.

Purchaser for value without notice. — We will now consider the question as to what constitutes a purchaser for value without notice.

Value. — First, as to value. The surrender of negotiable paper constitutes the plaintiff a purchaser for value; Bank of Salina v. Babcock, 21 Wend. 499; Outhwite v. Porter, 13 Mich.

533; Mohawk Bank v. Corey, 1 Hill 513; Ayrault v. McQueen, 32 Barb. 305; Essex Co. Bank v. Russell, 29 N. Y. 673; Keyes v. Wood, 21 Vt. 331; Phænix Ins. Co. v. Church, 81 N. Y. 218. So also where the plaintiff has given his signature to negotiable paper; Williams v. Smith, 2 Hill (N. Y.) 301; Wells v. Chapman, 81 Ill. 137; Stotts v. Byers, 17 Iowa 303; Adams v. Soule, 33 Vt. 538; Mickles v. Colvin, 4 Barb. 304; Bacon v. Hollaway, 2 E. D. Smith 159; Humphreys v. Vertner, Freem. Ch. (Miss.) 251. Forbearance to sue has been held a sufficient consideration to constitute a purchaser for value; Deere v. Marsden, 88 Mo. 512 (1886); Oates v. First Bank, 100 U. S. 239; Traders' Bank v. Bradner, 43 Barb. 379; Lewis v. Rogers, 34 N. Y. Supr. Ct. 64; Cary v. White, 52 N. Y. 138. But see Francia v. Joseph, 3 Edw. Ch. 182; Wardell v. Howell, 9 Wend. 170, contra. So the satisfaction and extinguishment of a precedent debt; Bank of Sandusky v. Scoville, 24 Wend. 115; Bank of St. Albans v. Gilliland, 23 Wend. 311; Brown v. Leavitt, 31 N. Y. 113; Mechanics Bank v. Crow, 60 N. Y. 85; Stevens v. Campbell, 13 Wis. 419; Chartered Bank v. Henderson, L. R. 5 P. C. 501; Poirier v. Morris, 2 E. & B. 89; Currie v. Misa, L. R. 10 Ex. 153; Merchants' Bank v. McClelland, 9 Col. 608 (1886); Soule v. Shotwell, 52 Miss. 236; Marbled Works v. Smith, 4 Duer 362. But see Lawrence v. Clark, 36 N. Y. 128; Turner v. Treadway, 53 N. Y. 650; Moore v. Ryder, 65 N. Y. 438; Wormley v. Lowry, 1 Humph. 468; Rhea v. Allison, 3 Head 176; Hickerson v. Raiganel, 2 Heisk. 329; Carpenter v. Republic Bank, 106 Penn. St. 170 (1884); Reid v. Mobile Bank, 70 Ala. 199. Paper taken in conditional payment of a precedent debt, or as collateral security therefor, has been held to be taken for value; Swift v. Tyson, 16 Pet. (U.S.) 1; Brooklyn City & Newtown R. R. Co. v. Nat. Bank of the Republic, 102 U. S. 14; Washington Bank v. Lewis, 22 Pick. 24; Fisher v. Fisher, 98 Mass. 303; Cobb v. Doyle, 7 R. I. 550; Atkinson v. Brooks, 26 Vt. 569; Boatman's Inst. v. Holland, 38 Mo. 49; Manning v. McClure, 36 Ill. 490; Harrison v. Pike, 48 Miss. 46; Straughan v. Fairchild, 80 Ind. 598; Olney First Nat. Bank v. Beaird, 3 Ill. App. 239; Draper v. Cowles, 27 Kans. 484; Sackett v. Johnson, 54 Cal. 107; Nickerson v. Ruger, 84 N. Y. 675; Vanliew v. Galesburg Bank, 21 Ill. App. 126 (1886); Noyes v. Landon, 59 Vt. 569 (1887); Kauffman v. Robey, 60 Tex. 308; Continental Bank v. Townsend, 87 N. Y. 8 (1881). But see contra,

Stalker v. McDonald, 6 Hill 93; Comstock v. Hier, 73 N. Y. 269; Royer v. Keystone Nat. Bank, 83 Penn. St. 248; Maynard v. Philadelphia Bank, 98 Penn. St. 250 (1882); Bone v. Tharp, 63 Iowa 223 (1884); Boykin v. Mobile Bank, 72 Ala. 262; Brainard v. Reavis, 2 Mo. App. 490; Nutter v. Stover, 48 Me. 163; Ayres v. Doying, 42 Hun (N. Y.) 630 (1887); Union Bank v. Barber, 56 Iowa 559 (1881); Rice v. Raitt, 17 N. H. 116; Allen v. Bratton, 47 Miss. 119; Bowman v. VanKuren, 29 Wis. 209; Bay v. Coddington, 5 John. Ch. 54. A holder of negotiable paper wrongfully transferred as collateral security is, of course, protected only to the amount of his debt thereby secured: Williams v. Smith, 2 Hill 301; Easter v. Minard, 26 Ill. 494; Saylor v. Daniels, 37 Ill. 331; Maitland v. Citizens' Bank, 40 Md. 540; Chicopee Bank v. Chapin, 8 Met. 40; Stoddard v. Kimball, 4 Cush. 604, 6 Cush. 469; Roche v. Ladd, 1 Allen 436; Drinkhouse v. Surette, 1 Allen 443; Grant v. Kidwell, 30 Mo. 455; Allaire v. Hartshorne, 1 Zab. 665; Atkinson v. Brooks, 26 Vt. 569; Dresser v. Railway Co., 93 U. S. 92; Hubbard v. Chapin, 2 Allen 328; Youngs v. Lee, 12 N. Y. 551; Miller v. Pollock, 99 Penn. St. 202 (1882); Stevens v. Corn Exch. Bank, 3 Hun 147; Brown v. Callaway, 41 Ark. 418 (1884). The better law seems clearly to be, that in case of the sale of commercial paper the purchaser may recover the face value of the note, whatever the price which he may have paid for it; Lay v. Wissman, 36 Iowa 305; In re Gomersall, 1 Ch. D. 137; Jones v. Gordon, 2 App. Cas. 616; Gould v. Segee, 5 Duer 260; Scott v. Seelye, 27 La. Ann. 95; Schoen v. Houghton, 50 Cal. 528; Citizens' Bank v. Ryman, 12 Neb. 541; Smith v. Jansen, 12 Neb. 125. But see Holcomb v. Wyckoff, 35 N. J. L. 35; Huff v. Wagner, 63 Barb. 215; Hargu v. Wilson, 63 Barb. 237; Todd v. Shelbourne, 8 Hun 510; Holeman v. Hobson, 8 Humph. 127, contra.

Notice.—Second, as to notice, it is now well settled law in England, and the present English rule has generally been adopted in this country, that gross negligence alone is insufficient to impair the rights of a purchaser for value of commercial paper in the ordinary course of business. In order to promote the circulation of such paper, and for its greater security, it is generally held that actual bad faith is necessary to prevent a recovery by such a holder; Goodman v. Harvey, 4 Ad. & E. 870 (overruling Gill v. Cubbitt, 3 B. & C. 466); Collins v. Gilbert,

94 U.S. 753; Ex parte Estabrook, 2 Lowell 547; Schoen v. Houghton, 50 Cal. 528; Craft's Appeal, 42 Conn. 146; Murray v. Beckwith, 81 Ill. 43; Spitler v. James, 32 Ind. 202; Lake v. Reed, 29 Iowa 258; Maitland v. Citizen's Bank, 40 Md. 540; Spooner v. Holmes, 102 Mass. 503; Smith v. Livingston, 111 Mass. 342; Howry v. Eppinger, 34 Mich. 29; Hamilton v. Marks, 63 Mo. 167; Merriam v. Rockwood, 47 N. H. 81; Bank v. Rider, 58 N. H. 512 (1882); Ormsbee v. Howe, 54 Vt. 182 (1881); Rock Island Bank v. Loyhed, 28 Minn. 396 (1881); Tumblety v. O'Connor, 13 Daly (N. Y.) 177 (1886); Cloud v. International Co., 23 Mo. App. 319 (1886); Republic Bank v. Young, 41 N. J. Eq. 531 (1885); Fairex v. Bier, 37 La. An. 821 (1885); Fox v. City Bank, 30 Kans. 441 (1883); Gerrish v. Bragg, 55 Vt. 329 (1883); Hamilton v. Vought, 34 N. J. L. 187; Chapman v. Rose, 56 N. Y. 137; Johnson v. Way, 27 Ohio St. 374; Moorehead v. Gilmore, 77 Penn. St. 118; Dutchess Co. Mutual Ins. Co. v. Hatchfield, 73 N. Y. 226; Farrell v. Lovett, 68 Me. 326; Lafayette Savings Bank v. St. Louis Stoneware Co., 4 Mo. App. 276; National Bank v. Hooper, 47 Md. 88; Frank v. Lillienfield, 33 Gratt. 377. See also Atlantic State Bank v. Savery, 82 N. Y. 291. But see Smith v. Mechanic's Bank, 6 La. An. 610; Nutter v. Stover, 48 Me. 163; Hunt v. Sandford, 6 Yerg. 387; Ryland v. Brown, 2 Head 270; Merritt v. Duncan, 7 Heisk. 156; Gould v. Stevens, 43 Vt. 125, contra. An advertisement in the newspaper is, of course, insufficient to bind a purchaser for value who has not received actual notice thereof; Lawson v. Weston, 4 Esp. 56; Kellogg v. French, 15 Gray 354. So the doctrine of lis pendens has no application to the transfer of negotiable paper; Kieffer v. Ehler, 18 Penn. St. 388; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Day v. Zimmerman, 68 Penn. St. 72; Little v. Hale, 11 Vt. 482; Kellogg v. Fancher, 23 Wisc. 21; Nat. Bank v. Texas, 20 Wall. 88; Board v. Texas R. R. 46, Tex. 316; Enos v. Tuttle, 3 Conn. 27. But see Somerville v. Brown, 5 Gill. 399, contra.

Constructive notice. — When, however, it appears on the face of the paper itself that there is some infirmity attaching to it, as that it was given for some special purpose, or that its negotiability was intended to be restricted, a purchaser for value is not protected; Prins v. South Branch Lumber Co., 20 Ill. App. 236 (1886); Metropolitan Bank v. City Bank,

19 Fed. Rep. 301 (1883); Gibson v. Hawkins, 69 Ga. 354 (1883). Thus a restrictive indorsement is constructive notice that the instrument is no longer negotiable; Ancher v. Bank of England, 2 Doug. 637; Treuttel v. Barandon, 8 Taunt. 100; Merchant's Bank v. Hanson, 33 Minn. 40 (1885). The addition of the words "for my use" is held to amount to a restrictive indorsement; Lloyd v. Sigourney, 5 Bing. 525; Sweeny v. Easter, 1 Wall. 166; Leary v. Blanchard, 48 Me. 269; Wilson v. Holmes, 5 Mass. 543; Third Bank v. Clark, 23 Minn. 263. But see Buckley v. Jackson, L. R. 3 Ex. 135. As to the effect of a conditional indorsement, see Robertson v. Kensington, 4 Taunt. 30; Wardell v. Hughes, 3 Wend. 418. It has been decided in Maryland, and it would seem correctly, that the addition of the word "trustee" to the name of the payee of a note is sufficient to put a purchaser upon inquiry as to the authority of the payee to negotiate it; Third National Bank v. Lange, 51 Md. 138. See also Shaw v. Spencer, 100 Mass. 382, where the same principle is applied to the transfer of certificates of stock; but see Westmoreland v. Foster, 60 Ala. 448, contra, where the word "trustee" was regarded as mere descriptio personæ. See also Reid v. Mobile Bank, 70 Ala. 199 (1883). So when it appears on the face of the instrument that the signature of one of the parties has been signed by procuration, a holder is bound by the actual authority of the agent; Stagg v. Elliott, 12 C. B. N. S. 381; Floyd Acceptances, 7 Wall. 666; Nixon v. Palmer, 4 Seld. 398; Mechanics' Bank v. N. Y. R. R., 13 N. Y. 631; Pope v. Albion Bank, 57 N. Y. 126; Stainback v. Bank of Va., 11 Gratt. 269. So in England, by parity of reasoning, it is held that one who receives paper containing unfilled blanks, knowing of their existence, must ascertain at his peril the authority of his transferor to fill them; Awde v. Dixon, 6 Ex. 869; Hatch v. Searles, 2 Sm. & G. 147; Hogarth v. Latham, 3 Q. B. D. 643. In this country, however, it is generally held that the maker is precluded from setting up the want of authority of the transferor as against a purchaser for value; Townsend v. France, 2 Houst. 441; Jones v. Primm, 6 Tex. 170; Huntington v. Branch Bank, 3 Ala. 186; Joseph v. Nat. Bank, 17 Kans. 256; Bank of Commonwealth v. Curry, 2 Dana 142; Chemung Bank v. Bradner, 44 N. Y. 680; Fullerton v. Sturges, 4 Ohio St. 529; Mitchell v. Culver, 7 Conn.

336; Page v. Morrell, 3 Keyes 117. But see Inglish v. Breneman, 5 Ark. 377; Ledwich v. McKim, 53 N. Y. 307; Davis Sewing Machine Co. v. Best, 105 N. Y. 59 (1887). As to the application of the principle of estoppel, when the blanks are filled by the transferor without the knowledge of the transferee, see note to Master v. Miller.

Transferee cannot stand on a worse footing than his transferor. - When the transferor is a purchaser for value without notice, all his rights will of course enure to the benefit of his transferee, although the transferee have notice of prior rights or equities, and although he give no value for the paper. The same principle applies as in the case of the transfer of overdue paper, when the purchaser acquires the rights of the last holder before maturity; Chalmers v. Lanion, 1 Camp. 383; Barker v. Parker, 10 Gray 339; Williams v. Matthews, 3 Cow. 252; Wilson v. Mechanic's Bank, 45 Penn. St. 494; Bassett v. Avery, 15 Ohio St. 299; Commissioners v. Clark, 94 U.S. 278; Thomas v. Ruddell, 66 Ind. 326; Inhabitants, etc., v. Ramsdell, 107 U.S. 147; Bank of Sonoma County v. Gove, 63 Cal. 355 (1883). If negotiable paper, however, be retransferred to a previous holder, in whose hands it was charged with equities, he is, of course, remitted to his original rights; Dillingham v. Blood, 66 Me. 140; Kost v. Bender, 25 Mich. 515; Calhoun v. Albin, 48 Mo. 304.

When a purchaser for value is protected by the doctrine of estoppel. — We have seen that the bona fide purchaser for value of commercial paper takes it discharged of all equitable defences which might have been set up by the maker or acceptor thereof against the payee; but for the further and more complete protection of such purchasers for value, the doctrine of estoppel has been invoked by the courts. In this class of cases the holder, on ordinary principles of law, can hardly be said to have a legal title to the instrument sued on, and in some instances the instrument itself is invalid as a legal contract in its very inception. Thus it is well settled law that a delivery animo contrahendi is, in general, necessary to the completion of a bill of exchange or promissory note as a binding legal contract; yet when negotiable paper is delivered as an escrow, or as a receipt or memorandum, or upon condition that some other person shall join as maker, it is held that the original maker or acceptor is estopped to set up this

defence against an innocent purchaser for value. As to bills and notes given as escrows, see Graff v. Logue, 61 Iowa 704 (1883); Fearing v. Clark, 16 Gray 74; Vallette v. Parker, 6 Wend. 615. But see Chipman v. Tucker, 38 Wisc. 43; Stringer v. Adams, 98 Ind. 539 (1884). See also Alexander v. Wilkes, 11 Lea (Tenn.) 221 (1883). As to commercial paper given as a receipt, see Eastman v. Shaw, 65 N. Y. 522; Paulette v. Brown, 40 Mo. 52.

As to paper given upon condition that a third person shall join, see Whitcomb v. Miller, 90 Ind. 384 (1883); Young v. Ward, 21 Ill. 223; Deardorff v. Foresman, 24 Ind. 481; Laub v. Rudd, 37 Iowa 617; Smith v. Moberly, 10 B. Mon. 266; Merritt v. Duncan, 7 Heisk. 156; Merriam v. Rockwood, 47 N. H. 81; Farmers' Bank v. Humphrey, 36 Vt. 554. By the great weight of authority, also, it is held that a purchaser for value is protected when there is no delivery whatever by the maker, and where the instrument has been wrongfully taken from his possession. It is difficult, however, to see how there can be, in this class of cases, any negligence on which to ground an estoppel. But see Clarke v. Johnson, 54 Ill. 296; Kinyon v. Wohlford, 17 Minn. 239; Gould v. Segee, 5 Duer 260; Briggs v. Ewart, 51 Mo. 245; Worcester Bank v. Dorchester Bank, 10 Cush. 488 (as to bank-notes stolen before they were issued). But see Burson v. Huntington, 21 Mich. 415; Cline v. Guthrie, 42 Ind. 227; Hall v. Wilson, 16 Barb. 548, contra. But when a negotiable instrument is stolen while in an incomplete state, and before the blanks are filled up, it is settled law that the filling up of the blanks is a forgery, and that a purchaser for value is not protected; Gould v. Segee, 5 Duer 270; Ledwich v. McKim, 53 N. Y. 315; Baxendale v. Bennett, 3 Q. B. D. 525. Another class of cases is where a person is betrayed into signing a bill or note by fraudulent representations that it is an instrument of a different kind. The animus contrahendi is, of course, wanting, and the test would seem to be whether the defendant is guilty of any negligence in signing the paper. As the act itself would in most cases import negligence, the defendant is generally held to be estopped as against bona fide purchasers for value; Exchange Bank v. Veneman, 43 Hun 241 (1887); Sturgis Bank v. Deal, 55 Mich. 592 (1886); Nicholls v. Baker, 75 Me. 334 (1883); Parkersburgh Bank v. Johns, 22 W. Va.

520 (1883); Douglass v. Matting, 29 Iowa 498; Carey v. Miller, 25 Hun (N. Y.) 28 (1881); McDonald v. Muscatine Nat. Bank, 27 Iowa 319; Chapman v. Rose, 56 N. Y. 137; Dinsmore v. Stimbert, 12 Neb. 433 (1881); Shirts v. Overjohn, 60 Mo. 305; Citizens' N. B. v. Smith, 55 N. H. 593; Leach v. Nicholls, 55 Ill. 273; Baldwin v. Barrows, 86 Ind. 351 (1882); Ross v. Doland, 29 Ohio St. 473. But see Cline v. Guthrie, 42 Ind. 227; Kagel v. Totten, 59 Md. 447 (1882); Woolen v. Whitacre, 73 Ind. 201; Millard v. Barton, 13 R. I. 601 (1882). In the case of impositions upon infirm or illiterate persons it is generally held that the doctrine of estoppel will not operate even for the protection of purchasers for value without notice. The ratio decidendi is that in such case the foundation of estoppel, negligence, is wanting; Foster v. McKinnon, L. R. 4 C. P. 704; Putnam v. Sullivan, 4 Mass. 45; Detwiler v. Bish, 44 Ind. 70; Gibbs v. Linabury, 22 Mich. 479; Anderson v. Walter, 34 Mich. 113; Briggs v. Ewart, 51 Mo. 245; Martin v. Smylee, 55 Mo. 577; Whitney v. Snyder, 2 Lans. 477; Fenton v. Robinson, 4 Hun 252; Bowers v. Thomas, 62 Wisc. 480 (1884); DeCamp v. Hamma, 29 Ohio St. 467; Walker v. Ebert, 29 Wisc. 194; Kellogg v. Steiner, 29 Wisc. 626; Griffiths v. Kellogg, 39 Wisc. 290; Van Brunt v. Singley, 85 Ill. 281; Fayette Co. v. Steffes, 54 Iowa 214. But see Mackey v. Peterson, 29 Minn. 298 (1882); Yeagley v. Webb, 86 Ind. 424 (1882); Williams v. Stoll, 79 Ind. 80 (1881). Of course a person over whose signature a promissory note has been written by a third person, without his knowledge or consent, is not liable even to a bonû fide purchaser for value. Here again there is clearly no negligence on which to found an estoppel. See Caulkins v. Whisler, 29 Iowa 495; Nance v. Lary, 5 Ala. 370. See also Cline v. Guthrie, 42 Ind. 227; Detwiler v. Bish, 44 Ind. 70. As has been seen, the maker of a note is estopped to deny the authority of the person to whom he has delivered it to fill up blanks, as against an innocent purchaser for value, and in this country, even though the purchaser had notice of the existence of such blanks (see supra); a fortiori the maker is estopped when the blanks have been filled up without the knowledge of the purchaser. See note to Master v. Miller.

As to the application of the doctrine of estoppel to commercial paper, when spaces are left in the body of a completed

instrument, or when memoranda joined thereto may be easily detached, see note to Master v. Miller, on the alteration of legal instruments.

Burden of proof as to bona fide ownership. - For the further protection of the holders of commercial paper, a primâ facie case is held to be established by the plaintiff by proof of the execution of the instrument by the defendant, and of the genuineness of the indorsements, where the paper is drawn payable to order. In the case of paper drawn payable to bearer, possession alone is sufficient for a primâ facie case, together with proof of execution; Wheeler v. Guild, 20 Pick. 545. See Gano v. McCarthy, 79 Ky. 409 (1882). In both cases the law raises the presumption that the holder is a purchaser for value in the ordinary course of business; Brown v. Spoffard, 95 U.S. 474; Collins v. Gilbert, 94 U.S. 753; Commissioners v. Clark, 94 U. S. 285; Vallete v. Parker, 6 Wend. 615; Davis v. Bartlett, 12 Ohio St. 544; Holmes v. Karsper, 5 Binn. 469; McCann v. Lewis, 9 Cal. 246; Hall v. Allen, 37 Ind. 541; Horton v. Bayne, 52 Mo. 531; Palmer v. Nassau Bank, 78 Ill. 380; Jackson v. Love, 82 N. C. 405; In re Tallassee Man. Co., 64 Ala. 593; Merchants' Nat. Bank v. Trustees, 62 Ga. 271; Johnson v. McMurry, 72 Mo. 282; Blum v. Loggins, 53 Tex. 136; Estabrook v. Boyle, 1 Allen 412; Smith v. Edgeworth, 3 Allen 233; Harger v. Worrall, 69 N. Y. 370; Battles v. Landerslager, 84 Penn. St. 446. In Bissell v. Morgan, 11 Cush. 198, it was held, where a suit was brought upon a note payable to bearer, without mention of the name of a specific payee, that before the plaintiff could avail himself of this presumption it was incumbent upon him to prove that he is a transferee of the note, and not the original holder thereof.

It is held, also, in most of the States, that this presumption is not rebutted by the proof of want or failure of consideration between the original parties. See cases cited supra. See, also, Kearney v. Whitehead, 34 La. An. 530 (1882); Duerson's Adm'r v. Alsop, 27 Gratt. 248; Goodman v. Simonds, 20 How. (U. S.) 343; Murray v. Lardner, 2 Wall. 110; Fletcher v. Gushee, 32 Me. 587; Belmont Branch Bank v. Hoge, 35 N. Y. 65; Emerson v. Burns, 114 Mass. 348 (semble); Harger v. Worrall, 69 N. Y. 370; Sloan v. Union Banking Co., 67 Penn. St. 470; Coakley v. Christie, 20 Neb. 509 (1886). But see Mayor of Wetumpka v. Wharf Co., 63 Ala. 611. On the proof

of fraud or illegality in the inception of a note, as on proof that a note payable to bearer has been stolen from a previous holder, the burden is upon the plaintiff to show that he is a purchaser for value. In the language of Baron Parke, in Bailey v. Bidwell, 13 M. & W. 73: "It certainly has been the universal understanding, since the later cases, that if the note were proved to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of some other person to sue upon it; and that such proof casts upon the holder the burden of showing that he was a bona fide holder for value." See Thomas v. Newton, 2 Carr. & P. 606; Hall v. Featherstone, 3 H. & N. 284; Duerson v. Alsop, 27 Gratt. 249; Sullivan v. Langley, 120 Mass. 437; Cottle v. Cleaves, 70 Me. 256; Johnson v. McMurry, 72 Mo. 282; Sharon v. Sharon, 68 Cal. 29 (1886); Lerch Hardware Company v. Columbia Bank, 109 Penn. St. 240 (1886); Terry v. Taylor, 64 Iowa 35 (1884); Comstock v. Hier, 73 N. Y. 269; Mitchell v. Tomlinson, 91 Ind. 167 (1883). See, also, cases cited supra.

On the proof of fraud or illegality by the defendant, the weight of authority seems to be in favor of the rule that it is enough for the plaintiff to prove that he paid value for the paper in the ordinary course of business, and that the burden is then upon the defendant to prove notice; Battles v. Laudenslager, 84 Penn. St. 446; Johnson v. McMurry, 72 Mo. 282; Davis v. Bartlett, 12 Ohio St. 541; Tod v. Wick, 36 Ohio St. 390; Hazzard v. Bank, 72 Ind. 133; Kellogg v. Curtis, 69 Me. 214; Wildsmith v. Tracy, 80 Ala. 258 (1886). But see Tilden v. Barnard, 43 Mich. 376; Monroe v. Cooper, 5 Pick. 412 (semble); Clark v. Thayer, 105 Mass. 216 (semble), contra. In the last three cases it would seem to be held by the court that on the proof of fraud or illegality by the defendant, the burden is upon the plaintiff to show, not only that he paid value, but that he purchased the paper without notice of prior equities.

Checks. — Bank-checks, unlike bills of exchange and promissory notes, are intended only for temporary circulation, but when drawn payable to order or bearer, they are governed by the same principles as to negotiability and the rights of bond fide purchasers for value; and the holder is protected by the

same presumptions of law. See in general as to the rights of bonâ fide purchasers for value of bank-checks: Hoffman v. Jersey City Bank, 46 N. J. L. 604 (1886); Ames v. Meriam, 98 Mass. 294; Rochester Bank v. Harris, 108 Mass. 514; Conroy v. Warren, 3 John. Cases 259; Hoyt v. Seeley, 18 Conn. 357; Mauran v. Lamb, 7 Cow. 176; Merchants' Bank v. Spicer, 6 Wend. 445; Woods v. Shræder, 4 Har. & J. 276; Keene v. Beard, 8 C. B. N. S. 380; Kuhns v. Gettysburg Nat. Bank, 68 Penn. St. 445; Merchant's Nat. Bank v. New Brunswick Sav. Bank, 33 N. J. L. 172; Stewart v. Smith, 17 Ohio St. 82; Cecil Bank v. Heald, 25 Md. 563; Currie v. Misa, L. R. 10 Ex. 153; Robertson v. Coleman, 141 Mass. 231 (1886); Priest v. Way, 87 Mo. 16 (1885); Metropolitan Bank v. Loyd, 90 N. Y. 530 (1882).

Certificates of deposit.—So certificates of deposit, issued to depositors by a bank, are negotiable instruments, and stand upon the same footing in this respect with other promissory notes, which they closely resemble. See Riddle v. Butler Bank, 27 Fed. Rep. 503 (1886); Hunt Appellant, 141 Mass. 515 (1886); Shute v. Pacific Bank, 136 Mass. 487; Miller v. Austin, 13 How. (U. S.) 218; Maxwell v. Agnew, 21 Fla. 154 (1886); Birch v. Fisher, 51 Mich. 36 (1883); Greggs v. Union County Bank, 87 Ind. 238 (1883); Pardee v. Fish, 60 N. Y. 268; Kilgore v. Bulkley, 14 Conn. 363; Munger v. Albany City Nat. Bank, 85 N. Y. 587; Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377; Fells Point Sav. Inst. v. Weedon, 28 Md. 320; Union Mills Bank v. Clark, 42 Hun (N. Y.) 16 (1886).

Certified checks.—A certified check is rather a certificate of deposit than an accepted bill, and the effect is the same as if the check had been surrendered to the bank and a certificate of deposit were received therefor; upon the certification of the check, therefore, the drawer is discharged from all liability. In Massachusetts alone it is held that the cashier and teller of a bank have no implied authority to certify checks, and in this State, therefore, certified checks are seldom employed; Mussey v. Eagle Bank, 9 Met. 313; Atlantic Bank v. Merchants' Bank, 10 Gray 532. But see Hill v. Nation Trust Co., 108 Penn. St. 1 (1885); Merchants' Bank v. State Bank, 10 Wall. 648; Cooke v. State National Bank, 52 N. Y. 115; Farmers', &c., Bank v. Butchers', &c., Bank, 16 N. Y. 133; Irving Bank v.

Wethnold, 36 N. Y. 335, contra. Certified checks are negotiable in like manner with promissory notes, when proper words of negotiability are employed; Birch v. Fisher, 51 Mich. 36 (1883); Greggs v. Union County Bank, 87 Ind. 238 (1883). As to the effect of the certification of a check, see Thompson v. Bank of British North America, 82 N. Y. 1, 6; First National Bank of Washington v. Whitman, 94 U. S. 343; Second National Bank of Baltimore v. Western National Bank of Baltimore, 51 Md. 128; Gibson v. Park Bank, 49 N. Y. Sup. Court 429; French v. Irwin, 4 Baxt. (Tenn.) 401; Andrews v. German American Bank, 9 Heisk. (Tenn.) 211; Mutual National Bank v. Rotgé, 28 La. An. 933; Bills v. National Park Bank, 89 N. Y. 343; Gibson v. National Park Bank, 98 N. Y. 87; Flour City Bank v. Traders' Bank, 105 N. Y. 550 (1886).

Bank-notes. - Bank-notes are a part of the money or currency of the country, and, unlike bills and notes payable to bearer on demand, are intended for permanent circulation. In this country, for the protection of the holders of current banknotes, it is held that the presumption is so strong that they are purchased for value without notice, that it is not rebutted by the proof of fraud in the inception of the note, or by proof that the note has been stolen from a previous holder. The burden of proof still rests upon the bank to show that the plaintiff is not an innocent purchaser for value; Worcester Co. Bank v. Dorchester Bank, 10 Cush. 488; Wyer v. Dorchester Bank, 11 Cush. 51; Louisiana Bank v. Bank U. S., 9 Mart. (La.) 398. But see De la Chaunette v. Bank of England, 9 B. & C. 208; Solomons v. Bank of England, 13 East 135. Bank-notes are, as has been seen, intended for permanent circulation, and it is held, therefore, that they are never overdue, and never barred by the statute of limitations; Solomons v. Bank of England, supra; Bullard v. Bell, 1 Mason 252; Ballard v. Greenbush, 24 Me. 336, 338. So bank-notes are so far money that they are held to be good legal tender unless expressly objected to on that ground; Phillips v. Blake, 1 Met. 156; Gushee v. Eddy, 11 Gray 502; Thomas v. Todd, 6 Hill 340; Codman v. Lubbock, 5 Dowl. & R. 289. As to the question whether the transferor of a bank-note warrants the solvency of the bank which issued it, the courts of the different States have held conflicting opinions, but since the old State banks have been

superseded by the national banks by act of Congress, the question has become one of little practical importance, by reason of the national bank-notes being secured by U.S. bonds deposited in the U.S. Treasury at Washington. U.S. treasury notes, or greenbacks, are not only a part of the currency of the country, like bank-notes, but are expressly made legal tender by the act of Congress creating them. This act has been declared constitutional, as a war measure, by the U.S. Supreme Court; Knox v. Lee, 12 Wall. 457, overruling Hepburn v. Griswold, 8 Wall. 603; and in a recent decision the same court has held that such an act of Congress is constitutional even in time of peace; Juilliard v. Greenman, 110 U.S. 421 (1884). The act of Congress creating silver certificates, it would seem, is also constitutional, but such certificates are not declared to be legal tender. Whether an act declaring them to be legal tender would be constitutional, quære.

Coupon bonds. — In England, great difficulty has been found in holding the coupon bonds of domestic corporations to be negotiable instruments; but in this country the courts have almost unanimously given effect to the custom of merchants, and have recognized the exigencies of modern business by holding such instruments negotiable. In many States, also, negotiability has been expressly conferred upon coupon bonds of corporations by the legislature. These States are Colorado, Florida, Georgia, Illinois, Kansas, Massachusetts, Nebraska, North Carolina, Ohio, and Tennessee. By the statute of 3 & 4 Anne, the quality of negotiability was undoubtedly confined to parole promises to pay money, but the courts of this country have very generally accommodated themselves to the demands of the business interests of the country, even without the intervention of statutes, and the coupon bonds of the United States, of the several States, of municipal, railroad, and other corporations, have been generally recognized as negotiable instruments, with all the peculiar privileges and attributes of such instruments. (See infra as to the negotiability of bonds of individuals and of specialties in general.) The leading case in favor of the negotiability of coupon bonds issued by a corporation is White v. The Vermont & Massachusetts Railroad, 21 How. (U.S.) 575. In this case, the Supreme Court of the United States held that the coupon bonds of a railroad corporation were negotiable. See Mercer Co. v. Hacket, 1 Wall. 83;

Cromwell v. County of Sac, 96 U.S. 51; Morgan v. United States, 113 U.S. 476 (1884); Mason v. Frick, 105 Penn. St. 162 (1884); Langdon v. Baxter, 57 Vt. 1; Ackley School District v. Hall, 113 U. S. 135 (1884); Marine & River Phosphate Co. v Bradley, 105 U.S. 175; Thompson v. Perrine, 106 U.S. 589; Hinckley v. Union Pacific Railroad, 129 Mass. 52; Hinckley v. Merchants' National Bank, 131 Mass. 147 (1881); Spooner v. Holmes, 102 Mass. 503; Mercer Co. Supers v. Hubbard, 45 Ill. 139; Town of Eagle v. Kohn, 84 Ill. 292; Evertson v. National Bank of Newport, 66 N. Y. 14; Parsons v. Jackson, 99 U. S. 434; Indiana & Illinois Central Ry. Co. v. Sprague, 103 U. S. 756; Stewart v. Lansing, 104 U. S. 505; Ottawa v. National Bank, 105 U.S. 342; Roberts v. Bolles, 101 U.S. 119; Pompton v. Cooper Union, 101 U. S. 196; McKim v. King, 58 Md. 502 (1882); Stern v. Germania Bank, 34 La. An. 1119 (1882); North Bennington Bank v. Mount Tabor, 52 Vt. 87.

2. Quasi-negotiable Instruments.

Bills of lading. - Bills of lading, certificates of stock, and letters of credit are often spoken of as quasi-negotiable instruments, and it may be convenient in this treatise to classify them under this head, although the word "quasi-negotiable" is inaccurate and often misleading. Bills of lading are contracts by the carrier for the delivery of goods received by him, whereas negotiable paper always contains a promise for the payment of money. This contract of the carrier, therefore, cannot, aside from statute, be transferred by the promisee so as to enable the assignee to bring suit in his own name upon the contract itself; Thompson v. Dominy, 14 M. & W. 403; Howard v. Shepherd, 9 C. B. 297; Baltimore Railroad v. Wilkins, 44 Md. 11; Blanchard v. Page, 8 Gray 297; Dows v. Cobb, 12 Barb. 310; Second Bank v. Walbridge, 19 Ohio St. 419; Hale v. Milwaukee Co., 29 Wis. 482. The courts have held, however, that upon a sale of the goods while in transitu, since an actual delivery is impossible, a transfer of the bill of lading constitutes a symbolical delivery of the goods themselves, and it is well settled law that such a transfer is as effectual for all purposes to pass the title to the goods, as an actual delivery would be. Upon the strength of this title so transferred, the indorsee of the bill of lading must support his

action against the carrier, since, as has been seen, no action ex contractu can be maintained by him. See cases cited supra. As to the effect of a transfer of the bill of lading by the consignee on the right of stoppage in transitu of the consignor, see note to Lickbarrow v. Mason. A bonâ fide purchaser for value of a bill of lading from a consignee who has procured it fraudulently from the consignor is, of course, protected against the equities of the consignor; but this arises from a well known principle of the law of sales, and does not depend upon the negotiable quality of the bill of lading; Pease v. Gloahec, L. R. 1 P. C. 219; Dows v. Green, 24 N. Y. 644; Dows v. Perrin, 16 N. Y. 325; Cartright v. Wilmerding, 24 N. Y. 521. But a transfer of a bill of lading by one having no title to the property will pass no right or title even to a purchaser for value without notice; Gurney v. Behrend, 3 E. & B. 622; Shaw v. Railroad Co., 101 U. S. 557; Tison v. Howard, 57 Ga. 410; Stollenwerck v. Thacher, 115 Mass. 224; Brown v. Peabody, 13 N. Y. 121; Barnard v. Campbell, 55 N. Y. 462. Purchasers and pledgees from consignees of bills of lading for sale, who have violated the instructions of their principals, are very generally protected by statute in the several States, and the whole subject of bills of lading has been largely modified by legislative enactment.

It is held in a few of the States that a common carrier is estopped, as against a bona fide purchaser for value of a bill of lading given by its agents, to deny that the goods therein described were actually received; Brooke v. New York, Lake Erie, etc., R. R. Co., 108 Penn. St. 529 (1885); Batavia Bank v. New York, Lake Erie, etc., R. R., 33 Hun 589 (1884); Sioux City, etc., v. Bank, 10 Neb. 556. But see Grant v. Norway, 10 C. B. 665; Baltimore & Ohio Railroad v. Wilkins, 44 Md. 11; Lowell Five Cents Savings Bank v. Winchester, 8 Allen 109, 118; Brown v. Powell Coal Co., L. R. 10 C. P. 562; Pollard v. Vinton, 105 U.S. 7; Williams v. Wilmington & Weldon Railroad, 93 N. C. 42 (1884). See in general as to the negotiable quality of bills of lading: Green Bay Bank v. Dearborn, 115 Mass. 219; Cairo Bank v. Crocker, 111 Mass. 163; Forbes v. Boston & Lowell Railroad, 133 Mass. 154 (1882); Tiedeman v. Knox, 53 Md. 612; Dodge v. Mever, 61 Cal. 405; Campbell v. Alford, 57 Tex. 159; Lehman v. Central Railroad Co., 4 Woods (C. C.) 560; Farmers' & Mechanics'

National Bank v. Logan, 74 N. Y. 568; Bank v. Haziltine, 78 N. Y. 104; Hieskell v. Farmers' & Mechanics' National Bank, 89 Penn. St. 155.

Warehouse receipts. — The transfer of warehouse receipts at the common law does not constitute even a symbolical delivery of the goods represented thereby; Farmeloe v. Bain, 1 C. P. D. 445; Hallgarten v. Oldham, 135 Mass. 1 (1883). But by statute in many of the States such receipts, especially public warehouse receipts, are placed upon the same footing as bills of lading. See Union Savings Association v. St. Louis Grain Elevator, 81 Mo. 341 (1884); Shaw v. Railroad Co., 101 U. S. 557; Burton v. Curyea, 40 Ill. 320; Greenbaum v. Megibben, 10 Bush 419; Merchants' Bank v. Union Railroad, 69 N. Y. 373; Price v. Wisconsin Co., 43 Wis. 267.

Certificates of stock. — Certificates of stock are not negotiable instruments, and the indorsee of such certificates, apart from statute, acquires only an equitable interest; Central National Bank v. Williston, 138 Mass. 244 (1885); Newell v. Williston, 138 Mass. 240; Bishop v. Globe, 135 Mass. 132 (1883); Sewall v. Boston Water Power Co., 4 Allen 277; Salisbury Mills v. Townsend, 109 Mass. 115; Shaw v. Spencer, 100 Mass. 382; Black v. Zacharie, 3 How. (U. S.) 483; Brown v. Adams, 5 Biss. 181. In this country, however, within a comparatively few years, a doctrine has been announced for the protection of bonâ fide purchasers which would seem to confer upon certificates of stock some of the attributes of commercial paper. the leading case of McNeil v. Tenth Bank, 46 N. Y. 325 (1871), it was held that one who had indorsed in blank a certificate of stock to his broker to secure him against loss on account of advances made by him, was estopped to set up his title against one to whom the broker had himself pledged the stock. "Simply intrusting the possession of a chattel to another as depositary, pledgee, or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted. . . . But if the owner intrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. . . . The holder of such a certificate and power possesses all the external indicia

of title to the stock, and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third parties; but, apparently, the legal title and the means of transferring such title in the most effective manner." Rapallo, J., in McNeil v. The Tenth Nat. Bank. Merchants' Bank v. Livingston, 74 N. Y. 223; Moore v. Metropolitan National Bank, 55 N. Y. 41; Dickinson v. Dudley, 17 Hun 569; International Bank v. German Bank, 71 Mo. 197; Garvin v. Wiswell, 83 Ill. 215; Otis v. Gardner, 105 Ill. 436; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Cherry v. Frost, 7 Lea. (Tenn.) 1; Moodie v. Seventh National Bank, 11 Phila. 366; Burton v. Peterson, 12 Phila. 397; Burton's Appeal, 93 Penn. St. 214; Canal Co.'s Appeal, 81 Penn. St. 19; Wood's Appeal, 92 Penn. St. 379, State Bank v. Cox, 11 Rich. Eq. 344; Walker v. Detroit Transit Co., 47 Mich. 338; Gass v. Hampton, 16 Nev. 185; Baldwin v. Canfield, 26 Minn. 43; Strange v. H. & T. C. R. R. Co., 53 Tex. 162, Id. 150, accord. In a recent case in Missouri a curious application of this principle was made in the case of the transfer of a nonnegotiable note, or a negotiable note negotiated after maturity. It was held that the true owner of such a note, who had clothed another with all the indicia of title, was estopped to set up his own title against a purchaser for value without notice; Lee v. Turner, 89 Mo. 489 (1886). Compare Rumball v. Metropolitan Bank, 2 Q. B. D. 194. The doctrine of the above cases depends upon the principle that an owner of stock who has by his own act given to another the jus disponendi of his property is estopped as to a bona fide purchaser for value who has been deceived thereby. It is well settled, however, that if certificates of stock, indorsed in blank, be stolen and transferred to a purchaser for value, the true owner is not estopped, and that, since certificates of stock indorsed in blank are not negotiable instruments transferable by delivery, the innocent purchaser is not protected; Anderson v. Nicholas, 28 N. Y. 600, 604; Pennsylvania Co.'s Appeal, 86 Penn. St. 80, 83; Wood's Appeal, 92 Penn. St. 379; Sprague v. Cocheco Manuf. Co., 10 Blatch. 173; Aull v. Colket, 2 W. N. (Penn.) 322; Barstow v. Savage, 64 Cal. 388 (1883), overruling Winter v. Belmont Mining

Co., 53 Cal. 428, and Sherwood v. Meadow Valley Mining Co., 50 Cal. 412.

Letters of credit and circular notes. — Letters of credit and circular notes, whether special, i. e., addressed to a particular person, or general, i. e., addressed to the world at large, are not, properly speaking, negotiable instruments. It is held, however, that a letter of credit which authorizes the drawing of bills of exchange by the person acting on the faith of it, will, under certain circumstances, amount to an actual acceptance of such bills, so that they may be sued upon by the payee or indorsee thereof; Agra v. Masterman's Bank, L. R. 2 Ch. App. 391; In re Blakely Co., L. R. 3 Ch. App. 154; Arents v. Commonwealth, 18 Gratt. 769; Bissell v. Lewis, 4 Mich. 450; Nelson v. First National Bank, 48 Ill. 39; Ulster Co. Bank v. McFarland, 5 Hill 434; 3 Denio 553; Russell v. Wiggin, 2 Story 213; Cassell v. Dows, 1 Blatch. 335; Coffman v. Campbell, 87 Ill. 98; Lonsdale v. Lafayette Bank, 18 Ohio St. 126. But see Coolidge v. Payson, 2 Wheat. 66; Boyce v. Edwards, 4 Pet. (U.S.) 111.

3. Non-negotiable Instruments.

Specialties. - It has been seen that the coupon bonds of a corporation are, in this country, held to be negotiable instruments by the custom of merchants, without the intervention of the legislature. Ordinary specialties, however, for the payment of money, expressed in the form of a bill of exchange, or promissory note, whether of a corporation or of an individual, are generally, apart from statute, held to be non-negotiable by the custom of merchants; Rawson v. Davidson, 49 Mich. 608 (1882), semble; Brown v. Jordhal, 32 Minn. 135 (1885); Laidley v. Bright, 17 W. Va. 779 (1882); The Mary Bradford, 18 Fed. Rep. 189; Clark v. Woolen Co, 15 Wend. 256; Brook v. Kiser, 69 Ga. 762 (1883); Corwine v. Junction R. R. Co., 3 Houst. 289. But see Irwin v. Brown, 2 Cranch (C. C.) 314, where the seal was held to be a mere superfluity. See also Pate v. Brown, 85 N. C. 166; Rand v. Dovey, 83 Penn. St. 280. It has been held that the coupon bonds of an individual are negotiable instruments within the custom of merchants; In re Leland, 6 Benedict 175; Fairbanks v. Sargent, 39 Hun (N. Y.) 588 (1886); Salisbury v. Michael, 96 N. C. 53 (1886).

Guaranties of commercial paper. - It would seem by the weight of authority that a contract of guaranty written on negotiable paper is not itself negotiable, and that it is only operative as between the immediate parties; whether written on the instrument by a stranger, contemporaneously with its execution; Hayden v. Weldon, 43 N. J. L. 128 (1881); Irish v. Cutter, 31 Me. 536; True v. Fuller, 21 Pick. 140; Ten Evck v. Brown, 4 Chandl. 151; Beckley v. Ecker, 3 Barr 292; Mc-Laren v. Watson, 26 Wend. 425; Northumberland Bank v. Ever, 58 Penn. St. 97; Baldwin v. Dow, 130 Mass. 416 (1881) (Webster v. Cobb, 17 Ill. 459; Cooper v. Dedrick, 22 Barb. 516, contra); or written subsequently to execution by the transferor, at the time of the transfer; Nevius v. Bank, 10 Mich. 547; Omaha N. B. v. Walker, 5 Fed. Rep. 399; Trust Co. v. National Bank, 101 U.S. 70; Belcher v. Smith, 7 Cush. 482; Myrick v. Hasey, 27 Me. 12. But see Partridge v. Davis, 20 Vt. 500; Heaton v. Hulbut, 3 Scam. 489; Heard v. Dubuque County Bank, 8 Neb. 10; Robinson v. Lair, 31 Iowa 9, contra. See also Castle v. Rickly, 44 Ohio St. 490 (1887); Osborne v. Lawson, 26 Mo. App. 549 (1886); Everson v. Gere. 40 Hun (N. Y.) 248 (1886).

CARTER v. BOEHM.

EASTER. -5 GEO. 3.

[REPORTED 3 BURR. 1905.]

Insurance on Fort Marlborough against foreign capture, effected by its governor. The weakness of the fort, and the probability of its being taken by the French, and that the insured knew these facts, but had not communicated them, were offered to be proved as a defence to an action on the policy. It was also objected that the insurance was against public policy. The plaintiff proved that the office of governor was mercantile, not military; and that the fort was never calculated to resist European enemies. Held, that the jury were justified in finding for the plaintiff.

The opinion of an insurance broker as to the materiality of the facts not communicated was thought inadmissible as evidence.

What concealments vitiate a policy.

This was an insurance cause, upon a policy underwritten by Mr. Charles Boehm, of interest or no interest; without benefit of salvage (a). The insurance was made by the plaintiff, for the benefit of his brother, Governor George Carter.

It was tried before Lord Mansfield at Guildhall; and a verdict was found for the plaintiff by a special jury of merchants.

On Saturday, the 19th of April last, Mr. Recorder Eyre, on behalf of the defendant, moved for a new trial.

His objection was, "that circumstances were not sufficiently disclosed."

⁽a) A policy containing these words of 14 Geo. 3, c. 48, against wager poliwould now be illegal, in consequence cies, Paterson v. Powell, 9 Bing. 32.

A rule was made to show cause: and copies of letters and depositions were ordered to be left with Lord Mansfield.

N. B. Four other cases depended upon this.

The counsel for the plaintiff, viz. Mr. Morton, Mr. Dunning, and Mr. Wallace, showed cause on Thursday, the first of this month. But first,

Lord Mansfield reported the evidence. That it was an action on a policy of insurance for one year; viz., from 16th of October, 1759, to 16th of October, 1760, for the benefit of the Governor of Fort Marlborough, George Carter, against the loss of Fort Marlborough, in the island of Sumatra, in the East Indies, by its being taken by a foreign enemy. The event happened: the fort was taken by Count d'Estaign within the year.

The first witness was Cawthorne, the policy-broker, who produced the memorandum given by the governor's brother, the plaintiff, to him: and the use made of these instructions was to show "that the insurance was made for the benefit of Governor Carter, and to insure him against the taking of the fort by a foreign enemy."

Both sides had been long in Chancery; and the Chancery evidence on both sides was read at the trial.

It was objected, on behalf of the defendant, to be a fraud, by concealment of circumstances which ought to have been disclosed; and particularly the weakness of the fort, and the probability of its being attacked by the French; which concealment was offered to be proved by two letters. The first was a letter from the governor to his brother Roger Carter, his trustee, the plaintiff in this cause: the second was from the governor to the East India Company.

The evidence in reply to this objection consisted of three depositions in Chancery, setting forth that the governor had 20,000*l*. in effects, and only insured 10,000*l*.: and that he was guilty of no fault in defending the fort.

The first of these depositions was Captain Tryon's: which proved that this was not a fort proper or designed to resist European enemies; but only calculated for defence against the natives of the island of *Sumatra*; and also that the governor's office is not military, but only mercantile; and that Fort Marlborough is only a subordinate factory to Fort St. George.

There was no evidence to the contrary. And a verdict was found for the plaintiff, by a special jury.

After his lordship had made his report,

The counsel for the plaintiff proceeded to show cause against a new trial.

They argued that there was no such concealment of circumstances (as the weakness of the fort, or the probability of the attack) as would amount to a fraud sufficient to vitiate this contract; all which circumstances were universally known to every merchant upon the Exchange of *London*. And all these circumstances they said were fully considered by a special jury of merchants, who are the proper judges of them.

And Mr. Dunning laid it down as a rule—"That the insured is only obliged to discover facts; not the ideas or speculations which he may entertain upon such facts."

They said this insurance was, in reality, no more than a wager; "whether the French would think it their interest to attack this fort; and if they should whether they would be able to get a ship of war up the river or not."

Sir Fletcher Norton and Mr. Recorder Eyre argued, contra, for the defendant, the underwriter.

They insisted, that the insurer has a right to know as much as the insured himself knows.

They alleged, too, that the broker is the sole agent of the insured.

There are general, universal principles, in all insurances.

Then they proceeded to argue in support of the present objection.

The broker had, they said, on being cross-examined, owned that he did not believe that the insurer would have meddled with the insurance, if he had seen these two letters.

All the circumstances ought to be disclosed.

This wager is not only "whether the fort shall be attacked;" but "whether it shall be attacked and taken."

Whatever really increases the risk ought to be disclosed.

Then they entered into the particulars which had been here kept concealed. And they insisted strongly, that the plaintiff ought to have discovered the weakness and absolute indefensibility of the fort. In this case, as against the insurer, he was obliged to make such discovery; though he acted for the governor. Indeed, a governor ought not, in point of policy, to be permitted to insure at all: but if he is permitted to insure, or will insure, he ought to disclose all facts.

It cannot be supposed that the insurer would have insured so low, at 4l. per cent., if he had known of these letters.

It is begging the question to say, "that a fort is not intended for defence against an enemy." The supposition is absurd and ridiculous. It must be presumed that it was intended for that purpose; and the presumption was "that the fort, the powder, the guns, &c., were in a good and proper condition." If they were not (and it is agreed that in fact they were not, and that the governor knew it), it ought to have been disclosed. But if he had disclosed this he could not have got the insurance. Therefore this was a fraudulent concealment; and the underwriter is not liable.

It does not follow that, because he did not insure his whole property, therefore it is good for what he has judged proper to insure. He might have his reasons for insuring only a part, and not the whole.

Cur. adv. vult.

Lord Mansfield now delivered the resolution of the Court. This is a motion for a new trial.

In support of it the counsel for the defendant contend "that some circumstances in the knowledge of Governor Carter, not having been mentioned at the time the policy was underwrote, amount to a concealment, which ought, in law, to avoid the policy."

The counsel for the plaintiff insist, "that the not mentioning these particulars does not amount to a concealment which ought, in law, to avoid the policy: either as a fraud, or as varying the contract."

1st. It may be proper to say something, in general, of concealments which avoid a policy.

2dly. To state particularly the case now under consideration.

3dly. To examine whether the verdict which finds this policy good, although the particulars objected were not mentioned, is well founded.

First. Insurance is a contract upon speculation.

The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a

belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.

The keeping back such circumstance is a fraud, and therefore the policy is void (a). Although the suppression should happen through mistake, without any fraudulent intention; yet still, the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement.

The policy would equally be void, against the underwriter, if he concealed; as if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium.

The governing principle is applicable to all contracts and

dealings.

Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary.

But either party may be innocently silent as to grounds open to both to exercise their judgment upon. Aliud est celare; aliud, tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire.

This definition of concealment, restrained to the efficient motive and precise subject of any contract, will generally hold to make it void, in favor of the party misled by his ignorance of the thing concealed.

There are many matters as to which the insured may be innocently silent; he need not mention what the underwriter knows—Scientia utrinque par pares contrahentes facit.

An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge.

The insured need not mention what the underwriter ought to know; (b) what he takes upon himself the knowledge of; or what he waives being informed of.

The underwriter needs not be told what lessens the risk

5 B. & A. 238; Mackintosh v. Marshall, 11 M. & W. 116 [Bates v. Hewitt, L. R. 2 Q. B. 595; Harrower v. Hutchinson, 5 Id. 584; Gandy v. Adelaide Insurance Co., 6 Id. 746].

⁽a) Fitzherbert v. Mather, 1 T. R. 12.
(b) See Elton v. Larkins, 8 Bing. 198;
Friere v. Woodhouse, Holt 572; Noble
v. Kennaway, Dougl. 510; Vallance v.
Dewar, 1 Camp. 503; Stewart v. Bell,

agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculation: as for instance, the underwriter is bound to know every cause which may occasion natural perils; as the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, &c. He is bound to know every cause which may occasion political perils; from the ruptures of states; from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their councils, or their want of strength, &c.

If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere, he needs not be told the secret enterprises they are destined upon; because he knows some expedition must be in view; and from the nature of his contract, without being told, he waives the information. If he insures for three years, he needs not be told any circumstance to show it may be over in two: or if he insures a voyage, with liberty of deviation, he needs not be told what tends to show there will be no deviation.

Men argue differently, from natural phenomena and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and, therefore, neither needs to communicate to the other.

The reason of the rule which obliges parties to disclose is to prevent fraud, and to encourage good faith.

It is adapted to such facts as vary the nature of the contract: which one privately knows, and the other is ignorant of, and has no reason to suspect.

The question, therefore, must always be, "whether there was, under all the circumstances at the time the policy was underwritten, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risk understood to be run."

This brings me, in the second place, to state the case now under consideration.

The policy is against the loss of Fort Marlborough, from being destroyed by, taken by, or surrendered unto, any European enemy, between the 1st of October, 1759, and the 1st of October, 1760. It was underwritten on the 9th of May, 1760.

The underwriter knew at the time that the policy was to indemnify to that amount Roger Carter, the Governor of Fort Marlborough, in case the event insured against should happen. The governor's instructions for the insurance, bearing date at Fort Marlborough, the 22d of September, 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants them knew of a letter written to the East India Company, which the company offered to put into my hands; but would not leliver to the parties, because it contained some matters which they did not think proper to be made public.

An objection occurred to me at the trial, "whether a policy, against the loss of Fort Marlborough, for the benefit of the governor was good;" upon the principle which does not allow a sailor to insure his wages (a).

But considering that this place, though called a fort, was really but a factory or settlement for trade; and that he, though called a governor, was really but a merchant: considering, too, that the law allows a captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part owner: and the captain of a privateer, if he be a part owner, to insure his share: considering, too, that the objection did not lie upon any ground of justice, in the mouth of the underwriter, who knew him to be the governor at the time he took the premium — and as, with regard to principles of public convenience, the case so seldom happens (I never saw one before), any danger from the example is little to be apprehended — I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially, too, as the objection did not come from the bar.

Though this point was mentioned, it was not insisted upon at the last trial; nor has it been seriously argued, upon this motion, as sufficient, alone, to vacate the policy: and if it had, we are all of opinion "that we were not warranted to say it is void upon this account."

on the rule of 17 & 18 Vict. c. 104, ss. 182, 183. The master's wages do not depend on the earning of freight: Hawkins v. Twizell, 5 E. & B. 883.]

⁽a) i. e. Because of its tendency to diminish his exertions for the safety of the thing insured: Webster v. De Tastet, 7 T. R. 157; Wilson v. R.E.A.Co., 2 Camp. 626. [Quære as to the effect

Upon the plaintiff's obtaining these two verdicts, the underwriters went into a court of equity; where they have had an opportunity to sift everything to the bottom, to get every discovery from the governor and his brother, and to examine any witnesses who were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term.

The plaintiff proved, without contradiction, that the place called Bencoolen, or Fort Marlborough, is a factory or settlement, but no military fort or fortress. That it was not established for a place of arms or defence against the attacks of a European enemy, but merely for the purpose of trade and of defence against the natives. That the fort was only intended and built with an intent to keep off the country blacks. the only security against European ships of war consisted in the difficulty of the entrance and navigation of the river, for want of proper pilots. That the general state and condition of the said fort, and of the strength thereof, was in general well known by most persons conversant or acquainted with Indian affairs, or the state of the company's factories or settlements; and could not be kept secret or concealed from persons who should endeavor, by proper inquiry, to inform themselves. That there were no apprehensions or intelligence of any attack by the French, until they attacked Nattal in February, 1760. That on the 8th of February, 1760, there was no suspicion of any design by the French. That the governor then bought, from the witness, goods to the value of 4000l., and had goods to the value of above 20,000l. and then dealt for 50,000l. and upwards. That on the 1st of April, 1760, the fort was attacked by a French man-of-war of 64 guns, and a frigate of 20 guns, under the Count d'Estaign, brought in by Dutch pilots; unavoidably taken, and afterwards delivered to the Dutch, and the prisoners sent to Batavia.

On the part of the defendant, after all the opportunities of inquiry, no evidence was offered that the French ever had any design upon Fort Marlborough before the end of March, 1760; or that there was the least intelligence or alarm "that they might make the attempt" till the taking of Nattal in the year 1760.

They did not offer to disprove the evidence that the governor had acted, as in full security, long after the month of September, 1759, and had turned his money into goods, so late as the 8th of February, 1760. There was no attempt to show that he had not lost by the capture very considerably beyond the balance of the insurance.

But the defendant relied upon a letter, written to the East India Company, bearing date the 16th of September, 1759, which was sent to England by the Pitt, Captain Wilson, who arrived in May, 1760, together with the instructions for insuring; and also a letter bearing date the 22d of September, 1759, sent to the plaintiff by the same conveyance, and at the same time (which letters his lordship repeated) (a).

They relied, too, upon the cross-examination of the broker, who negotiated the policy, "that, in his opinion, (b) these letters ought to have been shown, or the contents disclosed; and if they had, the policy would not have been underwritten."

The defendant's counsel contended at the trial, as they have done upon this motion, "that the policy was void":

1st. Because the state and condition of the fort mentioned in the governor's letter to the East India Company was not disclosed.

2dly. Because he did not disclose that the French, not being in a condition to relieve their friends upon the coast, were more likely to make an attack upon this settlement, rather than remain idle.

3dly. That he had not disclosed his having received a letter of the 4th of February, 1759, from which it seemed that the French had a design to take this settlement, by surprise, the year before.

They also contended that the opinion of the broker was almost decisive.

(a) The former of them notifies to the East India Company, that the French had, the preceding year, a design on foot, to attempt taking that settlement by surprise; and that it was very probable they might revive that design. It confesses and represents the weakness of the fort; its being sadly supplied with stores, arms, and ammunition; and the impracticability of maintaining it (in its then state) against a European enemy. The latter letter (to his brother) owns that he is "now

more afraid than formerly that the French should attack and take the settlement; for, as they cannot muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems they had such an intention last year." And therefore he desires his brother to get an insurance made upon his stock there.

(b) See Richards v. Murdock, 10 B.
 & C. 527; Campbell v. Rickards, 5 B.
 Ad. 846; 2 Nev. & M. 546.

The whole was laid before the jury; who found for the plaintiff.

Thirdly — It remains to consider these objections, and to examine "whether this verdict is well founded."

To this purpose it is necessary to consider the nature of the contract, at the time it was entered into.

The policy was signed in May, 1760. The contingency was, whether Fort Marlborough was or would be taken by a European enemy, between October, 1759, and October, 1760.

The computation of the risk depended upon the chance, "whether any European power would attack the place by sea." If they did, it was incapable of resistance.

The underwriter at London, in May, 1760, could judge much better of the probability of the contingency than Governor Carter could, at Fort Marlborough, in September, 1759. He knew the success of the operations of the war in Europe. He knew what naval force the English and French had sent to the East Indies. He knew from a comparison of that force, whether the sea was open to any such attempt by the French. He knew, or might know, everything which was known at Fort Marlborough, in September, 1759, of the general state of affairs in the East Indies, or the particular condition of Fort Marlborough, by the ship which brought the orders for the insurance. He knew that ship must have brought many letters to the East India Company; and particularly from the governor. He knew what probability there was of the Dutch committing or having committed hostilities.

Under these circumstances, and with this knowledge, he assures against the general contingency of the place being attacked by a European power.

If there had been any design on foot, or any enterprise begun in September, 1759, to the knowledge of the governor, it would have varied the risk understood by the underwriter; because, not being told of a particular design or attack then subsisting, he estimated the risk upon the foot of an uncertain operation, which might or might not be attempted.

But the governor had no notice of any design subsisting in September, 1759. There was no such design, in fact: the attempt was made without premeditation, from the sudden opportunity of a favorable occasion, by the connivance and assistance of the Dutch, which tempted Count d'Estaign to break his parole.

These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of concealments.

The first concealment is, that he did not disclose the condition of the place.

The underwriter knew the insurance was for the governor. He knew the governor must be acquainted with the state of the place. He knew the governor could not disclose it, consistent with his duty. He knew the governor, by insuring, apprehended at least the possibility of an attack. With this knowledge, without asking a question, he underwrote.

By so doing, he took the knowledge of the state of the place upon himself. It was a matter as to which he might be informed various ways — It was not a matter within the private knowledge of the governor only.

But, not to rely upon that, the utmost which can be contended is, that the underwriter trusted to the fort being in the condition in which it ought to be; in like manner as it is taken for granted, that a ship insured is seaworthy (a).

What is that condition? All the witnesses agree "that it was only to resist the natives, and not a European force." The policy insures against a total loss; taking for granted "that if the place was attacked it would be lost."

The contingency, therefore, which the underwriter has insured against is, "whether the place would be attacked by a European force;" and not "whether it would be able to resist such an attack, if the ships could get up the river."

It was particularly left for the jury to consider, "whether this was the contingency in the contemplation of the parties;" they have found that it was.

And we are all of opinion, "that, in this respect, their conclusion is agreeable to the evidence."

In this view, the state and condition of the place was material, only in case of a land attack by the natives.

The second concealment is, his not having disclosed, that from the *French* not being able to relieve their friends upon the coast, they might make them a visit.

This is no part of the fact of the case: it is mere speculation of the governor's, from the general state of the war. The con-

⁽a) [Except in the case of a time policy: Gibson v. Small, 4 H. & L. Ca. 353.]

jecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror, in his own dominions. The practicability of it, in this case, depended upon the *English* naval force in those seas; which the underwriter could better judge of at *London*, in May, 1760, than the governor could, at Fort Marlborough, in September, 1759.

The third concealment is that he did not disclose the letter from Mr. Winch, of the 4th of February, 1759, mentioning the design of the *French* the year before.

What the letter was, how he mentioned the design, or upon what authority he mentioned it; or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose.

The plaintiff offered to read the account Winch wrote to the East India Company; which was objected to; and, therefore, not read. The nature of that intelligence, therefore, is very doubtful. But taking it in the strongest light, it is a report of a design to surprise, the year before; but then dropped.

This is a topic of mere general speculation; which made no part of the facts of the case upon which the insurance was to be made.

It was said, if a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud; I agree to it (a). But if he knew that two privateers had been there the year before, it would be no fraud not to mention that circumstance; because it does not follow that they will cruise this year at the same time, in the same place; or that they are in a condition to do it. If the circumstance of "this design laid aside" had been mentioned, it would have tended rather to lessen the risk than increase it; for, the design of a surprise which has transpired, and been laid aside, is less likely to be taken up again: especially by a vanquished enemy.

The jury considered the nature of the governor's silence, as to these particulars; they thought it innocent; and that the omission to mention them did not vary the contract. And we

⁽a) Acc. Beckwaite v. Walgrove, cited 3 Taunt. 41; see Durell v. Bederley, 1 Holt, 263.

are all of opinion, "that, in this respect, they judged extremely right."

There is a silence, not objected to at the trial, nor upon this motion, which might with as much reason have been objected to as the last two omissions; rather more.

It appears by the governor's letter to the plaintiff, "that he was principally apprehensive of a *Dutch* war." He certainly had what he thought good grounds for this apprehension. Count d'Estaign, being piloted by the *Dutch*, delivering the fort to the *Dutch*, and sending the prisoners to *Batavia*, is a confirmation of those grounds. And probably the loss of the place was owing to the *Dutch*. The *French* could not have got up the river without *Dutch* pilots; and it is plain the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the *Dutch*.

The reason why the counsel have not objected to his not disclosing the ground of this apprehension is, because it must have arisen from political speculation, and general intelligence; therefore, they agree it is not necessary to communicate such things to an underwriter.

Lastly: great stress was laid upon the opinion of the broker.

But we all think the jury ought not to pay the least regard to it. It is mere opinion; which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent, or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause; and, therefore, it is improper and irrelevant in the mouth of a witness (a).

There is no imputation upon the governor as to any intention of fraud. By the same conveyance which brought his orders to insure, he wrote to the company everything which he knew or suspected; he desired nothing to be kept a secret which he wrote either to them or his brother. His subsequent conduct, down to the 8th of February, 1760, showed that he thought the danger very improbable.

The reason of the rule against concealments is to prevent fraud and encourage good faith.

⁽a) Accord. Campbell v. Rickards, 5 ing Rickards v. Murdock, 10 B. & C. 527. B. & Ad. 846; 2 N. & M. 546; overrul- See Chapman v. Walton, 10 Bing. 57.

If the defendant's objections were to prevail, in the present case, the rule would be turned into an instrument of fraud.

The underwriter here, knowing the governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either; signed this policy, without asking a question.

If the objection "that he was not told" is sufficient to vacate it, he took the premium, knowing the policy to be void; in order to gain, if the alternative turned out one way; and to make no satisfaction, if it turned out the other. He drew the governor into a false confidence, "that if the worst should happen, he had provided against total ruin;" knowing, at the same time, "that the indemnity to which the governor trusted was void."

There was not a word said to him of the affairs of India, or the state of the war there, or the condition of Fort Marlborough. If he thought that omission an objection at the time, he ought not to have signed the policy with a secret reserve in his own mind to make it void: if he dispensed with the information, and did not think this silence an objection then, he cannot take it up now, after the event.

What has often been said of the Statute of Frauds may, with more propriety, be applied to every rule of law, drawn from the principles of natural equity, to prevent fraud, "that it should never be so turned, construed, or used, as to protect or be a means of fraud."

After the fullest deliberation, we are all clear that the verdict is well founded; and there ought not to be a new trial; consequently that the rule for that purpose ought to be discharged.

Rule discharged.

This case is inserted on account of the masterly exposition of some of the leading principles of insurance law contained in the judgment of the Lord Chief Justice. It would not be proper to pass from it without informing the reader that a great deal of controversy has since taken place upon one of the subjects incidentally touched upon by his lordship, viz., the admissibility of the broker's evidence as to his opinion on the materiality of the facts not communicated. "Great stress," says his lordship, "was laid on the opinion of the broker: but we all think the jury ought not to pay the least regard to it. It is mere opinion,

which is not evidence. It is opinion after an event. It is opinion, without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could be drawn only from the same premises from which the court and jury were to determine the cause; and, therefore, it is improper and irrelevant in the mouth of a witness."

Very similar were the expressions of Gibbs, C. J., in *Durrell v. Bederley*, Holt, 283: "It is my opinion that the evidence of the underwriters, who were called to give their opinion of the materiality of the rumors, and the effect they would have had upon the premium, is not admissible. *It is not a question of science*, upon which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless." And upon the ground thus stated by Gibbs, C. J., it has been frequently sought to distinguish *Lindenau v. Desborough*, 8 B. & C. 586, in which, in an action on a life policy, the evidence of medical men, as to the materiality of certain symptoms which had not been communicated, was received and laid before the jury, from the question as to the admissibility of the opinions of brokers and underwriters.

In Rickards v. Murdock, 10 B. & C. 527, such evidence was, however, admitted. That was an action on a policy, effected by the plaintiff, as agent for Mr. Campbell, of Sydney, upon goods by the ship Cumberland. Upon the trial it appeared that Mr. Campbell, having shipped the goods in question by the Cumberland, wrote by another ship (the Australia), to the plaintiff, desiring him to effect an insurance thereon, and telling him, at the same time, that, in order to give every chance for the Cumberland's arrival, he had directed the person intrusted with that letter not to deliver it till thirty days after the Australia's reaching London. These instructions were obeyed: the Cumberland not having arrived at the expiration of the prescribed period, the letter was delivered to the plaintiff, who thereupon handed the letter to their broker, desiring him to effect the insurance, which he accordingly did with the Indemnity Insurance Company, whom the defendant represented. But he read to the company's manager that part of the letter only which contained the instruction to insure, the nature of the goods, and the time of their sailing. At the trial it was contended that the other circumstances respecting the mode in which the letter was conveyed to England, and the time it had remained there, were material, and ought to have been communicated, and that their suppression vitiated the policy; and several underwriters were called, who deposed that, in their opinion, the whole of the letter ought to have been communicated, and that the parts suppressed were material. This evidence was objected to, but admitted; and, on a motion for a new trial, after a verdict for the defendant, Lord Tenterden, delivering the judgment of the court, said, "Several witnesses were examined, who stated that they thought the letter material; but it has been contended that no such evidence ought to have been received. I know not how the materiality of any matter is to be ascertained but by the evidence of persons conversant with the subject-matter of the inquiry."

This opinion seems to be embraced by the Court of Common Pleas, in Chapman v. Walton, 10 Bing. 57. In that case the defendant, who was a broker, had effected policies for Richardson, in which the voyage was described to be "at and from London to St. Thomas, with leave to call at Madeira and Teneriffe." Richardson afterwards received a letter from his supercargo, who stated that he intended to sail the next day "for the Canaries," and thence to one or more of the West Indian Islands, say Barbadoes, St. Kitt's and St. 'Ahomas, where he was told that he should be able to dispose of the part of his cargo unsold "in the Canaries." With respect to linens he said he had no fear,

"as in Canary any reasonable quantity is desirable." This letter Richardson handed to the defendant, telling him "that the voyage was altered, and that he left him to do the needful with it." The defendant got the policies altered by adding leave to proceed to St. Kitt's and Barbadoes for all purposes. The vessel was lost at the Grand Canary Island. Actions were brought on the policies, which turned out unsuccessful on account of the voyage not being covered by the alterations, and this action was brought by the assignees of Richardson, who had become a bankrupt, against the defendant, for negligence in not having procured the proper alterations to be made. The plaintiffs contended that it was the defendant's duty to have procured the insertion of "liberty to proceed or touch at any of the Canary Islands." The defendant's counsel, on the other hand, called several policy-brokers, and putting into their hands the policies, the bills of lading, and invoices of the goods, and the supercargo's letter, asked them what alterations of the policies a skilful insurance broker ought, in their judgment, to have procured, having these documents in his possession, and being instructed to do the needful. To which question they replied, that they thought he would do ample justice by procuring the alterations as made. The jury having found for the defendant, the court discharged a rule for a new trial, moved on the ground that this evidence had been improperly admitted.

"It is objected," said the Lord Chief Justice, delivering the judgment of the court, "that to allow this question to be put to the witnesses is, in effect and substance, to allow them to be asked, what is the meaning of the letter? - that is, to ask them whether the letter told the defendant that the vessel was going to the Canaries, whereas the letter ought to be allowed to speak for itself, or, if there were any doubt upon the meaning, it ought to be determined by the court and jury, and not by the evidence of insurance brokers, or any other witnesses. It may be admitted that, if such were the real nature of the question, the evidence offered would have been inadmissible. . . . But it is not a simple abstract question, as supposed by the plaintiffs, what the words of the letter mean? it is what others conversant with the business of a policy broker would have understood it to mean, and how they would have acted upon it under the same circumstances. The time of year at which the voyage is performed — the nature of the cargo on board — the objects of the voyage, as disclosed in the letter — above all, the circumstance that the original voyage described in the policy itself comprehended Teneriffe, the greatest and most important of the Canary Islands, would all operate in the minds of experienced men in determining whether it was intended that the alteration should include a liberty to touch and stay at the Canaries in general; and this conclusion, it appears to us, neither judge nor jury could arrive at from the simple perusal of the letter, unassisted by evidence, because they would not have the experience upon which a judgment could be formed.

"The decision in this case appears to be consistent with the principle laid down by Mr. Justice Holroyd, in Berthon v. Loughman, 2 Star. N. P. 258, that a witness conversant with the subject of insurance might give his opinion, as a matter of judgment, whether particular facts, if disclosed, would make a difference as to the amount of the premium—a principle which has been confirmed by the later case of Rickards v. Murdock, 10 B. & C. 527; and it is difficult to reconcile the opinion given by Lord Chief Justice Gibbs, in the case of Durrell v. Bederley, Holt, N. P. C. 283, with the judgment of the Court of King's Bench in the case last above referred to. We think, therefore, both on principle, and on the authority of the decided cases, the evidence was properly admitted."

It is remarkable that the above case, which was decided in Trinity Term,

1833, and contains a recognition of the opinion of the King's Bench in *Rickards* v. *Murdock*, should not have been alluded to in any stage of *Campbell* v. *Rickards*, 5 B. & Ad. 840, decided in the Michaelmas Term of the same year.

Campbell v. Rickards arose out of the same transaction as Rickards v. Murdock. The action brought against the insurance office having, as we have seen, failed in consequence of the suppression by the broker, who was employed by Rickards & Co. to effect the policy, Campbell, the merchant of Sydney, upon whose goods the policy had been effected, brought this action against Rickards & Co., to recover compensation for the loss which he had sustained by their negligence in not taking care that the policy effected should be valid. At the trial several brokers and underwriters were called for the plaintiff, and the same letter which was produced in Rickards v. Murdock being put into their hands, they were asked "whether it was material to have communicated the fact that that letter had arrived in this country thirty days before effecting this insurance?" The answer was, that it was material. The jury having found a verdict for the plaintiff, and a new trial being moved for, on the ground that the evidence had been improperly admitted, the rule was made absolute.

The Lord Chief Justice Denman, delivering the judgment of the court, referred to the opinion of Lord Mansfield in Carter v. Boehm, and that of Chief Justice Gibbs in Durrell v. Bederley. "In some more recent cases," continued his lordship, "such questions have certainly been proposed to witnesses, but they have passed without objection, and it may be observed that the answers will imply no more than scientific witnesses may properly state - their opinion on some question of science. This is especially true of medical opinions. In Rickards v. Murdock, indeed, out of which this present case arises, this kind of testimony was received. In giving judgment on the motion for a new trial, Lord Tenterden did not expressly defend its admissibility, but his words are in the alternative. 'If such evidence be rejected, the court and jury must decide the point by their own judgment, unassisted by that of others. If they are to decide, all the court agree in thinking the letter was material, and ought to have been communicated, and that a jury would have been bound to come to that conclusion.' Now this mode of disposing of the question does not appear to the court, on reflection, to be quite correct; but we think that, as the jury are to decide on the materiality of facts, and the duty of disclosing them, this verdict, founded in some degree on evidence that could not be legally received, ought to be set aside. The rule for a new trial must therefore be made absolute."

Such being the state of the authorities, the question of admissibility can be hardly even now considered as settled; for opposed to the decision of the King's Bench in Campbell v. Rickards is the opinion of the judges of that court in Rickards v. Murdock, recognized by the Court of Common Pleas in Chapman v. Walton. The difference is, however, perhaps less upon any point of law than on the application of a settled law to certain states of facts; for, on the one hand, it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it; see Folkes v. Chadd, 3 Dougl. 157; R. v. Searle, 2 M. & M. 75; Thornton v. R. E. Assurance Co., Peake 25; Chaurand v. Angerstein, Peake 43; McNaghten's Case, 10 Cl. & Fin. 200; Greville v. Chapman, 5 Q. B. 731; and Fenwick v. Bell, 1 Car. & Kir. 312, Coltman, J.; but see Silk v. Brown, 9 Car. & P. 601, Coleridge, J.; while, on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the

inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. Now, the question of materiality in an assurance seems one which may possibly happen to fall within either of the above two classes, for, setting out of the question the cases of life policies, where the medical evidence is unquestionably scientific, and necessary in order to enable the jury to come to a right conclusion, it is submitted that it may happen, even in cases of sea policies, that a communication, the materiality of which is in question, may be one respecting the importance of which no one excepting an underwriter can, in all probability, form a correct opinion. If such a case were to occur, it possibly would not be considered as falling within the decision in Campbell v. Rickards. In that case the facts concealed were of the very simplest nature; a vessel which sailed after the one insured had arrived thirty-nine days before it, and it was easy, without much experience in the business of an underwriter, to divine the probable fate of the ship insured under those circumstances.

In Mr. Arnould's valuable work on the law of marine insurance and average, Vol. I. pp. [591-593, 6th ed. by Maclachlan], the conflicting opinions on the subject of the above note are considered, and the American decisions are stated to be in the same unsettled state as our own. The author marshals the authorities in both countries as follows: - Lord Mansfield in Carter v. Boehm; Gibbs, C. J., in Durrell v. Bederley; and Lord Denman in Campbell v. Rickards, supra, against receiving the evidence; Lord Kenyon in Chaurand v. Angerstein; Holroyd, J., in Berthon v. Loughman; Lord Tenterden in Richards v. Murdock; and Tindal, C. J., in Chapman v. Walton, supra (and see Elton v. Larkins, 5 C. & B. 392), expressly in favor of its reception; and tacitly so, by receiving and acting upon it without objection, Mansfield, C. J., Littledale v. Dixon, 1 N. R. 151; and Lord Ellenborough, Haywood v. Rogers, 4 East 590. In America there are the opinions of Chancellor Kent, 3 Kent's Com. [285, note (e), edit. 1873]; Judge Story, in M'Lanahan v. Universal Ins. Co., 1 Peters, 188; and Mr. Duer, in his work on Representations, 184-191, note xix., to the same effect. latter writer has pointed out that the evidence was refused in Carter v. Boehm, on account of the unusual nature of the risk, namely, the capture of a fort in the East Indies; so that in the language of Lord Mansfield, the evidence was "mere opinion, without the least foundation from any previous precedent or usage." And the author first referred to concludes that the arguments in favor of the admission of the evidence far outweigh those which have been urged against it. [In Ionides v. Pender, L. R. 9 Q. B. 531, 43 L. J. Q. B. 227, the evidence was admitted without objection.]

As to the principal point discussed and decided by Lord Mansfield—the effect of concealments by the insured when procuring a policy—the American authorities seem to be as follows:—

In the first place, in the case of the simplest form of the contract of insurance, not complicated by express agreements, representations, or warranties, and in the absence of direct inquiry, the applicant for insurance is bound in general to see that the underwriter understands clearly every material fact affecting

the risk. The intentional concealment of any material fact amounts to fraud; the innocent concealment, though not fraudulent, has the same effect in vitiating the contract, because it prevents the minds of the parties from meeting on the same risk. Though this is the general rule, it should be remembered in stating it that the exceptions to it are so important as to modify essentially the apparently rigorous operation of the rule itself.

Among the facts the concealment of which has been held, under the rule, to avoid the policy are the following: the fact that the master of a vessel has largely overinsured his interest in the voyage; Sun Marine Ins. Co. v. Ocean Ins. Co., 107 U. S. 485. The fact that there is reasonable ground to believe that the vessel to be insured is lost; Graham v. Gen'l Mut. Ins. Co., 6 La. Ann. 432. The time of a vessel's sailing; M'Lanahan v. Universal Ins. Co., 1 Peters 170; Livingston v. Delafield, 3 Caines 49; but see Fiske v. N. E. Ins. Co., 15 Pick. 310. The fact that a vessel is bound to a port as to which a decree of confiscation is expected or is believed to have issued; Hoyt v. Gilman, 8 Mass. 336. The fact that goods insured from Newport to Spain have been brought to Newport from Laguira without being landed, and have therefore been made liable to confiscation; Kohne v. Ins. Co. of N. A., 6 Binn. 219. The fact that a vessel insured from Charleston to Marseilles had really come from Havana, merely touching at Charleston, and was therefore liable to confiscation; Stoney v. Union Ins. Co., 3 McCord 387. The fact that a vessel in time of war carries false papers, unless it be a usage of trade; Livingstone v. The Md. Ins. Co., 6 Cr. 274, 7 Cr. 506. The fact of the occurrence of a violent storm at a place about the time when a vessel would naturally have arrived there; Moses v. The Delaware Ins. Co., 1 Wash. C. C. 385; Ely v. Hallett, 2 Caines 57. The fact that a vessel starting later had arrived first in storms; Vale v. Phænix Ins. Co., 1 Wash. C. C. 283. The fact, in a case of reinsurance, that the owner of the property is of bad repute among insurers on account of previous suspicious losses; N. Y. Bowery Ins. Co. v. N. Y. Fire Ins. Co., 17 Wend. 359. The fact that the applicant was induced to procure the insurance by rumors of an attempt to burn a neighboring building; Walden v. La. Ins. Co., 12 La. 134; or by several attempts to burn the property insured; Beebe v. Hartford Ins.

Co., 25 Conn. 51. The fact that benzine is kept in a barrel factory; McFarland v. Peabody Ins. Co., 6 West Va. 425. A serious overstatement of the amount of insurance already placed on the property; Armour v. Transatlantic Fire Ins. Co., 90 N. Y. 450. The fact of pregnancy in an applicant for life insurance; Lefavour v. Ins. Co., 1 Phila. 558. The fact that the applicant has had the symptoms of consumption; Vose v. Eagle Life & Health Ins. Co., 6 Cush. 42.

In the following cases, the facts concealed were adjudged to be immaterial; that is, to have no tendency, even if stated, to increase the risk or the amount of premium demanded, or to cause the underwriter to refuse insurance. Their concealment, therefore, did not vitiate the policy. Mere fears that the vessel to be insured is lost; Ruggles v. General Interest Ins. Co., 4 Mason 74; mere threats to burn property; Curry v. Commonwealth Ins. Co., 10 Pick. 535; the mere fact of a previous fire on the premises, cause unknown; Protection Ins. Co. v. Harmer, 2 Ohio St. 452; see also Lyon v. Commercial Ins. Co., 2 Rob. (La.) 266; Russ v. Waldo Ins. Co., 52 Me. 187. The question of the materiality of the facts concealed is, of course, a question for the jury; M'Lanahan v. Universal Ins. Co., 1 Peters 170, and cases supra.

The exceptions to the general rule are as follows:

- (a) Where the fact concealed is not known to the applicant; Vale v. Phœnix Ins. Co., 1 Wash. C. C. 283; Biays v. Union Ins. Co., Id. 506; Ruggles v. General Interest Ins. Co., 4 Mason 74; General Interest Ins. Co. v. Ruggles, 12 Wheat. 408; Merchants' Ins. Co. v. Washington Ins. Co., 1 Handy 408; Clement v. Phenix Ins. Co., 6 Blatch. C. C. 481.
- (b) Where it is known through some other source to the underwriter; Green v. Merchants' Ins. Co., 10 Pick. 402; Patten v. Merchants' Ins. Co., 40 N. H. 375; Beal v. Park Fire Ins. Co., 16 Wisc. 241; James River Ins. Co. v. Merritt, 47 Ala. 387; Carson v. Jersey City Ins. Co., 43 N. J. L. 300; Peck v. New London Ins. Co., 22 Conn. 575.
- (c) Where the concealment is as to matter of opinion, not of fact; Ruggles v. General Int. Ins. Co., 4 Mason 74; Insurance Co. v. Harmer, 2 Ohio St. 452.
- (d) Where the fact concealed is a matter which the underwriter is bound to know, as:—
 - 1. Matters of custom and usage. A custom to carry false

papers or belligerent property in time of war; LeRoy v. United Ins. Co., 7 John. 343; Livingston v. Md. Ins. Co., 7 Cr. 506; Calbreath v. Gracy, 1 Wash. C. C. 219; McFee v. S. S. Ins. Co., 2 McCord 503; Buck v. Chesapeake Ins. Co., 1 Pet. 151; The Ins. Co.'s v. Bathurst, 5 Gill & J. 159; Livingston v. Maryland Ins. Co., 7 Cranch 506. A custom to keep a stock of white cotton rags in a country store; Elliott v. The Hamilton Ins. Co., 13 Gray 139. A custom to keep oils and varnishes for finishing furniture; Haley v. Dorchester Mut. Ins. Co., 12 Gray 545. A custom to keep naphtha for killing moths; Wheeler v. Traders Ins. Co., 1 Atlantic Rep. (N. H. 1885) 293. A custom to use the word "room" as meaning "loft" or "story;" Daniels v. Hudson River Ins. Co., 12 Cush. 416. The usages of foreign ports in regard to the fitting-out of a vessel; Hazard's Adm. v. N. E. Ins. Co., 8 Peters 582. A custom to unload at anchorage in the open sea, there being no ports on the coast; De Longuemere v. N. Y. Fire Ins. Co., 10 John. 120. A custom to build steamboats on the hulls of old keel boats; Lexington Ins. Co. v. Paver, 16 Ohio 324. A custom in St. Domingo in regard to the treatment of a foreign vessel by the authorities; Norris v. Ins. Co. of N. A., 3 Yeates 84. A usage of trade in regard to the meaning of "rags and old metals;" Mooney v. Howard Ins. Co., 138 Mass. 375.

- 2. Natural laws and their probable effects; Keith v. Globe Ins. Co., 52 Ill. 518.
- 3. Political complications; Seton et al. v. Low, 1 Johns. Cas. 1; The Ins. Co.'s v. Bathurst, 5 Gill & J. 159; Buck v. Chesapeake Ins. Co., 1 Pet. 151; Keith v. Globe Ins. Co., 52 Ill. 518.
- 4. Facts of which the underwriter has the same means of knowledge as the applicant. As, facts published in newspapers equally accessible to both parties; Ruggles v. General Interest Ins. Co., 4 Mason 74; Green v. Merchants Ins. Co., 10 Pick. 402; Alsop v. Commercial Ins. Co., 1 Sumn. 451.
- (e) Where the underwriter waives the communication of the fact by the applicant. The underwriter may know from the terms of the particular contract that there are certain facts existing which may affect the risk, and whose full character is undisclosed to him; or he may have this knowledge from his knowledge of what ordinarily does, or what in the nature of things must, exist in a particular class of risks; or he may gain it from answers to other questions put by him to the applicant;

it may be an inference only, which the ordinary reasonable man would draw under the circumstances.

In whatever way he gains the knowledge of or infers the existence of such undisclosed facts, he is then bound, if he wishes further information in regard to them, to inquire; if he do not inquire, he is held to waive such information. He has, of course, still the right to be informed of any facts of an unusual character whose existence he could not reasonably anticipate.

Thus there is no concealment in not stating the mode of heating and lighting a building; for the underwriter knows that the building must have heat and light, and if he considers it material for him to know how they are supplied he must inquire; Girard Fire & Marine Ins. Co. v. Stephenson, 37 Penn. St. 293; Clark et al. v. Manufacturers' Ins. Co., 8 How. 235; Boggs v. America Ins. Co., 30 Mo. 63. Nor in failing to state the names of tenants, or their occupations; Lyon v. Commercial Ins. Co., 2 Rob. (La.) 266. Or the fact that the building to be insured is vacant; Browning v. Home Ins. Co., 71 N. Y. 508. Or that a corn-kiln is attached to it, that being frequently the case with such property; Satterthwaite v. Mutual Ins. Ass., 12 Penn. St. 393. Or that there is a brick oven on the premises; Richards v. Washington Ins. Co., 60 Mich. 420. Or that a portion of the building is used as a dwelling-house; Boggs v. America Ins. Co., 30 Mo. 63. Or any of the details of matters affecting the risk; Com. v. Hide & Leather Ins. Co., 112 Mass. 136. Or the details of previous unexplained fires in a house, when the fact that there have been such fires is stated; Beebe v. Hartford Ins. Co., 25 Conn. 51. Or the details as to the time which a vessel is overdue, when notice that she is overdue is given; Alsop v. Commercial Ins. Co., 1 Sumn. 451. Or the age of a vessel, the nature of her construction, or her reputation for seaworthiness; Popleston v. Kitchen, 3 Wash. C. C. 138; Augusta Ins. Co. v. Abbott, 12 Md. 348. Or the fact that other underwriters have refused the risk; Ruggles v. General Interest Ins. Co., 4 Mason 74. Or the character of a vessel or her owners or cargo, as neutral or belligerent, in time of war, especially when the policy is "for whom it may concern," or "covering all risks" or "all kinds of lawful goods;" Buck v. Chesapeake Ins. Co., 1 Pet. 151; The Ins. Co.'s v. Bathurst, 5 Gill & J. 159; Seton v. Low, 1 Johns. Cas. 1; Skidmore v. Desdoity, 2 Johns. Cas. 77; Juhel v. Rhinelander, Id. 120; Hodgson v. Marine Ins. Co., 5 Cranch 100; Livingston v. Maryland Ins. Co., 7 Cranch 506; contra, Stocker v. Merrimack M. & F. Ins. Co., 6 Mass. 220; Richardson v. Maine Ins. Co., Id. 102. Or habits of eating or drinking, in the case of life insurance; Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282. Or a previous insanity recovered from; Mallory v. Travelers' Ins. Co., 47 N. Y. 52. Or the particular nature of the interest of the applicant (provided he have any insurable interest) in the property to be insured; or the fact that there are incumbrances upon it.

In regard to this last class of cases, as to the applicant's interest, it would seem that there had been unnecessary confusion, sometimes in the cases themselves, more often in the commentaries upon them. The decisions are nearly all in accord, and the true reason upon which they are based is the simple one above stated.

The underwriter knows that, in the nature of things, every piece of property which he insures may have any number of distinct owners or quasi owners with distinct species of interests; the varieties of interest, of course, will vary in the different classes of risks; in some the nature of the applicant's interest may be immaterial, in others it may be extremely material; but whether material or not in any particular case the underwriter himself best knows, and he can by a question compel a full disclosure from the applicant. If he, under such circumstances, chooses to insure without inquiry, he is rightly held to have waived information on the point. The most accurate statement of the rule in this class of cases is that given by the U. S. Supreme Court:—

"Unless the true ownership or interest in the property is required by the conditions of the policy to be specifically and with particularity set forth, it will in general be sufficient if the insured has an insurable interest under any status of ownership or possession in cases where no inquiries are made;" Insurance Co. v. Haven, 95 U. S. at p. 248; Locke v. North American Ins. Co., 13 Mass. 62; Bartlett v. Walter, Id. 267; Strong v. Manufacturers' Ins. Co., 10 Pick. 40; Fletcher v. Commonwealth Ins. Co., 18 Pick. 419; Turner v. Burrows, 5 Wend. 541; Tyler v. Ætna Fire Ins. Co., 12 Wend. 507; Protection Ins. Co. v. Harmer, 2 Ohio St. 452; Russ v. Waldo Ins.

Co., 52 Me. 187; Buck v. Phænix Ins. Co., 76 Me. 586; Delahay v. Memphis Ins. Co., 8 Humph. 684; Johannes v. Standard Fire Office, 3 N. W. Rep. (Wisc. 1887) 298; Hill v. Lafayette Ins. Co., 2 Mich. 476; Guest v. N. H. Ins. Co., 33 N. W. Rep. (Mich. 1887) 31; De Armand v. Home Ins. Co., 28 Fed. Rep. 603; Lewis v., N. E. Ins. Co., 29 Fed. Rep. 496; Hough v. City Fire Ins. Co., 29 Conn. 10; Lebanon Ins. Co. v. Erb, 112 Penn. St. 149; Imperial Ins. Co. v. Dunham, 12 Atlantic Rep. (Penn. 1888) 668; Sussex Mut. Ins. Co. v. Woodruff, 26 N. J. Law 541; Franklin Fire Ins. Co. v. Martin, 40 N. J. Law 568; Franklin Fire Ins. Co. v. Coates, 14 Md. 285; Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442; Insurance Co. v. Haven, 95 U.S. 242. It has frequently been said that the U.S. Supreme Court, followed by some State courts, has adopted a contrary rule. There certainly were expressions used by Judge Story in his opinion in the Columbia Ins. Co. v. Lawrence, 10 Pet. 507, and in Carpenter v. Providence Ins. Co., 16 Pet. 495, which would warrant such a conclusion, but these remarks in each case were entirely obiter, and do not affect the correctness of the decisions. It is apparent also that Chief Justice Marshall, who gave the opinion in Columbia Ins. Co. v. Lawrence, 2 Pet. 25, when it first came before the court, guarded his remarks much more carefully, and confined himself to the true ground of the decision, which was that there had been, not a mere failure to state the interest of the insured, but a false statement, a misrepresentation of it. Upon that ground the decision is clearly right, that a misrepresentation on a material point will avoid the policy. Upon a similar state of facts, a similar decision has been given in jurisdictions where the general exception here contended for has been most fully established; Smith v. Bowditch Ins. Co., 6 Cush. 448; Mutual Ins. Co. v. Deale, 18 Md. 26. And it would seem that the remarks already quoted of the U.S. Supreme Court, upon the subject, in Insurance Co. v. Haven, 95 U.S. at pp. 248, 249, citing and explaining the previous case of Columbia Ins. Co. v. Lawrence, have settled the question, and leave the Supreme Court in perfect accord with the various State courts in this matter.

A single apparent exception to this class of cases arises where the facts relating to the interest of the applicant are so peculiar and unusual that the underwriter cannot reasonably be supposed to know or to infer their existence, and where

therefore his failure to inquire cannot be construed as a waiver of further information. The applicant then is thrown back upon his general duty to disclose, if the facts be material. As a private agreement between mortgagee and mortgagor which essentially modifies the relations of the parties to the underwriter; Kernochan v. N. Y. Bowery Fire Ins. Co., 5 Duer 1. Or a private parol trust between two who were represented on the ship's papers as co-owners; Ohl v. Eagle Ins. Co., 4 Mason 397. One other exception, having its foundation apparently in the ancient custom of merchants, exists: that where the applicant's interest is that of lender on a bottomry bond, it must be so stated in the policy; Robertson v. United Ins. Co., 2 Johns. Cas. 250.

In the second place, where there are special agreements, or inquiries,—

It has naturally seemed to underwriters, in view of the foregoing principles, that it would be prudent, before completing a contract of insurance, to make it somewhat more specific, either by the insertion of stipulations or warranties as to a full disclosure; or by the insertion of interrogatories, which, with their answers, would become the foundation for the contract and so a part of it; or by the further insertion of warranties or agreements for the accuracy of the answers. Of course, if an applicant warrant strictly the accuracy of all his statements, or replies to interrogatories, or the fulness of his disclosures, he may compel himself, upon pain of avoiding his policy, not only to state facts which are immaterial, but even facts which are unknown to him; Vose v. Eagle Life & Health Ins. Co., 6 Cush. 42; Baker v. Home Life Ins. Co., 64 N. Y. 648; Powers v. N. E. Mut. Life Ass'n, 50 Vt. 630; and facts which are perfectly well known through another source to the underwriter, as facts which are known to the underwriter's agent; Vose v. Eagle Life & Health Ins. Co., 6 Cush. 42; Lowell v. Middlesex Ins. Co., 8 Cush. 127; Lee v. Howard Ins. Co., 3 Gray 583; Blooming Grove Ins. Co. v. McAnerny, 102 Penn. St. 335; Jennings v. Chenango Ins. Co., 2 Denio 75; Kennedy v. St. Lawrence Ins. Co., 10 Barb. 285; Brown v. Cattaraugus Ins. Co., 18 N. Y. 385; Chase v. Hamilton Ins. Co., 20 N. Y. 52; Foot v. Ætna Life Ins. Co., 61 N. Y. 571; Barteau v. Phœnix Ins. Co., 67 N. Y. 595. But compare the cases contra, where the agent of the underwriter drew up the application and either caused or was

privy to the concealment; Plumb v. Cattaraugus Ins. Co., 18 N. Y. 392; Rowley v. Empire Ins. Co., 36 N. Y. 550; Bennett v. Agricultural Ins. Co., 106 N. Y. 243; N. A. Ins. Co. v. Throop, 22 Mich. 146; Richards v. Washington Ins. Co., 60 Mich. 420; Protection Ins. Co. v. Harmer, 2 Ohio St. 452; Continental Ins. Co. v. Kasey, 25 Gratt. 268; Ayres v. Hartford Ins. Co., 17 Iowa 176; Anson et al. v. Winnesheik Ins. Co., 23 Iowa 84; Eggleston v. Council Bluffs Ins. Co., 65 Iowa 308; Woodbury Savings Bank v. Charter Oak Ins. Co., 31 Conn. 517; Schwarzbach v. Protective Union, 25 W. Va. 622; Insurance Co. v. Wilkinson, 13 Wall 222. In all cases, however, where a warranty of any description enters into the contract, the decision must depend upon the terms of the warranty in each particular case, and the discussion of these cases does not fall within the branch of the law now under consideration. It may be said, however, that the courts are averse to interpreting any provision as a warranty which is fairly susceptible of a milder interpretation, or to extending the provisions of a warranty unnecessarily.

In the absence of a warranty, it is the duty of the applicant, in addition to his general duty, already discussed, to carry out, with substantial accuracy, any agreement or stipulation in regard to his statements which forms a part of the contract; and in the absence of any such agreement or stipulation, it is his duty to answer, with substantial truthfulness and accuracy, every inquiry put to him by the underwriter, without regard to the materiality of the fact inquired about. Any concealment caused by a failure in this respect, whether wilful or innocent, will avoid the policy.

An inquiry by the underwriter is, in its very nature, made as the basis for a contract. This would appear by the underwriter's refusing the risk if the applicant should refuse to answer. If the applicant chooses to answer, he makes the question and answer a part of the contract, and thereby impliedly agrees that a statement of the facts inquired about shall be material to the completion of that contract — whether the facts themselves are or are not material to the risk. Hence, a failure to state, with substantial fulness and accuracy, all the facts which may fairly and reasonably be considered called for by the question, is fatal to the policy, even though the fact omitted be really immaterial to the risk. The duty of the

applicant is not more strict even when there is a specific agreement for the fulness and accuracy of the answers. Of course, the true construction of the terms of the contract is in each case a question for the court, and the question whether an answer is substantially full and accurate is a question for the jury; Davenport v. New Eng. Mut. Ins. Co., 6 Cush. 340; Clark v. N. E. Mut. Ins. Co., 6 Cush. 342; Hayward v. N. E. Mut. Ins. Co., 10 Cush. 444; Draper v. Charter Oak Ins. Co., 2 Allen 569; Towne v. Fitchburg Mut. Ins. Co., 7 Allen 51; Campbell v. N. E. Mut. Ins. Co., 98 Mass. 381; Hutchins v. Cleveland Ins. Co., 11 Ohio St. 477; Glade v. Germania Ins. Co., 56 Iowa 400; Brown v. Williams, 28 Me. 252; Day v. Charter Oak Ins. Co., 51 Me. 91; Horn v. Amicable Life Ins. Co., 64 Barb. 81; Chaffee v. Cattaraugus Co. Ins. Co., 18 N. Y. 376; Schwarzbach v. Protective Union, 25 W. Va. 622; N. A. Ins. Co. v. Throop, 22 Mich. 146; Beck v. Hibernia Ins. Co., 44 Md. 95; Ætna Life Ins. Co. v. France, 91 U. S. 510.

The terms of the contract often make the applicant responsible only for concealments of facts material to the risk, and in such cases the question of the materiality of the fact concealed becomes important, and is a question for the jury; Elliott v. Hamilton Ins. Co., 13 Gray 139; Richmondville Seminary v. Hamilton Ins. Co., 14 Gray 459; Eddy v. Hawkeye Ins. Co., 70 Iowa 472. There is the usual exception from the operation of the rule, of facts which are unknown to the applicant; and of facts which are known through some other source to the underwriter; and of facts which the underwriter is legally bound to know; unless there be some controlling stipulation to the contrary in the contract; Keith v. Globe Ins. Co., 52 Ill. 518; Carson v. Jersey City Ins. Co., 43 N. J. L. 300; Columbia Ins. Co. v. Cooper, 50 Penn. St. 339; Patter v. Ins. Co., 40 N. H. 375; Wheeler v. Traders Ins. Co., 1 Atlantic Rep. (N. H. 1885) 293. Probably a concealment in reply to a question which was clearly impertinent, irrelevant, or frivolous, would not avoid the policy; Campbell v. N. E. Mut. Ins. Co., 98 Mass. 406. So if a question is left unanswered, or if the answer is irresponsive or ambiguous, the underwriter waives the inaccuracy by not inquiring further or insisting upon an answer; Gates v. Madison Co. Ins. Co., 2 N. Y. 43; Edington v. Mutual Life Ins. Co., 67 N. Y. 185; Nicoll v. American Ins. Co., 3 W. & M. 530; Carson v. Jersey City Ins. Co., 43 N. J. L. 300;

Penn. Ins. Co. v. Wilder, 100 Ind. 92; Hall v. People's Ins. Co., 6 Gray 185; Liberty Hall Asso. v. Housatonic Ins. Co., 7 Gray 261; Com. v. Hide & Leather Ins. Co., 112 Mass. 136; Armenia Ins. Co. v. Paul, 91 Penn. St. 520; Lebanon Ins. Co. v. Kepler, 106 Penn. St. 28; Phænix Ins. Co. v. Raddin, 120 U. S. 183. If the question itself be, in the judgment of the ordinarily intelligent man, equivocal or indefinite, it is sufficient if the applicant answer it truthfully as he understands it. Thus a question as to the distance of the property "from other buildings of less than ten rods" may be sufficiently answered by stating only the nearest buildings; Gates v. The Madison Co. Ins. Co., 2 N. Y. 43; Masters v. Same, 11 Barb. 624; Dennison v. Thomaston Mut. Fire Ins. Co., 20 Me. 125. But see Richmondville Seminary v. Hamilton Mut. Ins. Co., 14 Gray 459; Tebbetts v. Hamilton Ins. Co., 1 Allen 305; Hardy v. Union Mut. Ins. Co., 4 Allen 217; Chaffee v. Cattaraugus Co. Ins. Co., 18 N. Y. 376; Brown v. Same, Id. 385; Plumb v. Same, Id. 392; Kennedy v. St. Lawrence Ins. Co., 10 Barb. 285; Jennings v. Chenango Ins. Co., 2 Denio 75; Burritt v. Saratoga Co. Ins. Co., 5 Hill 188. So a question involving the meaning of the word "loft;" Daniels et al. v. Hudson River Ins. Co., 12 Cush. 416. So a question as to any sickness within ten years; Mutual Benefit Ins. Co. v. Wise, 34 Md. 582. So a question as to any "serious illness;" Hoyle v. Guardian Ins. Co., 6 Rob't (N. Y.) 567; Mason's Benev. Soc. v. Winthrop, 85 Ill. 537; Schwarzbach v. Protective Union, 25 W. Va. 622; Brown v. Metropolitan Ins. Co., 32 N. W. Rep. (Mich.) 610; or whether the functions of the brain were in a "healthy state;" Higbie v. Guardian Mut. Life Ins. Co., 53 N. Y. 603; or as to "how long since the party was attended by a physician? For what disease?" Moulor v. Ins. Co., 101 U.S. 708; World Ins. Co. v. Schultz, 73 Ill. 586; Brown v. Metropolitan Ins. Co., 32 N. W. Rep. (Mich. 1887) 610; or as to "an affection of the liver;" Conn. Ins. Co. v. Union Trust Co., 112 U. S. 250; or as to the "spitting of blood;" Dreier v. Continental Ins. Co., 24 Fed. Rep. 670; and in general, Mutual Mill Co. v. Gordon, 121 Ill. 366. If the question require an opinion, it is sufficient if the opinion given be honest, though in fact incorrect. Thus a question as to the value of the property to be insured calls for an opinion, and an answer which is incorrect is sufficient if the applicant was honest in making it; Harrington v. Fitchburg Ins. Co., 124 Mass. 126; Franklin Ins. Co. v. Vaughn, 92 U. S. 516; National Bank v. Ins. Co., 95 U. S. 673; Williams v. Phænix Ins. Co., 61 Me. 67; Bonham v. Iowa Ins. Co., 25 Iowa 328; Behrens v. Germania Ins. Co., 64 Iowa 19; Clark v. Phænix Ins. Co., 38 Cal. 168; Gerhauser v. North British Ins. Co., 7 Nev. 174; Ins. Co. v. McDowell, 50 Ill. 120.

In regard to the vexed question of the admissibility of expert evidence to aid the jury in deciding whether a certain fact is or is not material to the risk, or does or does not increase the risk, there is still much confusion in the cases.

A risk is a matter of deduction. A fact is material to the risk when upon its introduction the previous deduction is changed, and the new deduction is a higher risk. But the word "higher," like the word "material," may mean one thing to the cautious man and another to the venturesome; one thing to the insured and another to the insurer; one thing to an ordinary man and another to an expert. Whose meaning of the word is to be taken by the court as a standard? So with the word "deduction;" from the same state of facts, the Western underwriter often draws one deduction, while the more cautious underwriter in the East draws a very different one; and, away from those who are skilled in the business, the deductions vary still more widely, under the influence of different standards of temperament and education. Whose deduction shall be the standard? Must it not be the deduction which would be drawn by a man of ordinary prudence and intelligence, in possession of all the information attainable upon the subject, and with a reasonable amount of education in drawing such deductions? This really amounts to saying that it must be the deduction of a man of ordinary prudence and intelligence, skilled in the underwriter's business; or, as a rough-andready standard — a reasonable and prudent underwriter.

Whenever, therefore, upon the introduction of a new fact, the risk deduced by a reasonable and prudent underwriter is, to his mind, a new and higher risk, then that fact is a fact "material to the risk;" and his charge will be a higher premium — which is only another way of saying the same thing.

If the ideal reasonable and prudent underwriter had actually made a deduction, that might be proved like any other fact; this can be approximated in cases where the underwriting community, generally, are in agreement upon the same deduction;

for their general agreement is an approximate proof of the deduction of an ideal reasonable one from among them. An expert may therefore be asked to state the deduction of underwriters generally, as a fact, if it exists and he is cognizant of it; Luce v. Dorchester Ins. Co., 105 Mass. 298; Kirby v. Ins. Co., 13 Lea 340; Planters' Ins. Co. v. Rowland, 66 Md. 236, contra; Schwarzbach v. Protective Union, 25 W. Va. 622.

But no expert can be asked what, in his opinion, would be the deduction of underwriters in general in cases where no such deduction or no similar deduction had actually been made; for this would be mere opinion of the probable result of a process of reasoning in the minds of a number of unknown individuals. An insurance expert may be adept in deducing risks himself, and in a knowledge of the ordinary deductions made by others in the same business, but not in guessing what deductions other men would make upon a state of facts which they had never considered; Hawes et al. v. N. E. Ins. Co., 2 Curtis C. C. 229.

Neither can an expert be asked what, in his opinion, would be the deduction of any particular underwriter, as, for instance, the one who underwrote the particular risk; for, besides being open to the same objection as in the last case, there is a still more serious objection, that the fact in issue is not the deduction of the particular underwriter who underwrote the risk, but the deduction of an ideal reasonable and prudent underwriter, and the fact that one particular underwriter has made a certain deduction is irrelevant even if offered as a fact, still more so when, no deduction having been made by the underwriter in fact, an expert is asked for an opinion as to what it would be if made. In Carter v. Boehm, for instance, the broker was asked, substantially, what, in his opinion, would have been the opinion of the underwriter who took that particular risk, upon a question such as no underwriter had probably ever had occasion to form an opinion upon before; Luce v. Dorchester Ins. Co., 105 Mass. 298.

A third limitation, and much the most important one, is the fundamental rule, in regard to expert testimony in general, that no expert can be asked his opinion when the facts upon which it is founded involve no peculiar science or information, but are within the common knowledge of men; Protection Ins. Co. v. Harmer, 2 Ohio St. 452; Hill v. Lafayette Ins. Co., 2

Mich. 476; Franklin Ins. Co. v. Gruver, 100 Penn. St. 266; Joyce v. Maine Ins. Co., 45 Me. 168; Cannell v. Phœnix Ins. Co., 59 Me. 582; Thayer v. Providence Ins. Co., 70 Me. 539; Rawls v. American Ins. Co., 27 N. Y. 282; Jefferson Ins. Co. v. Cotheal, 7 Wend. 72; Kirby v. Ins. Co., 9 Lea 142; Lyman et al. v. State Ins. Co., 14 Allen 329; Luce v. Dorchester Ins. Co., 105 Mass. 298; Mulry v. Mohawk Valley Ins. Co., 5 Gray 541; White v. Ballou et al., 8 Allen 408; Milwaukee Railway Co. v. Kellogg, 94 U. S. 469.

Subject to these limitations, the opinions of experts in insurance cases may be called for as freely as in any other class of cases. There will often be cases where it is necessary and proper to have the opinions of persons skilled in the knowledge of the human system in health and disease; or of experts in the various departments of mechanical or nautical science; M'Lanahan v. Universal Ins. Co., 1 Pet. pp. 188, 189; Protection Ins. Co. v. Harmer, 2 Ohio St. 452; Slocovitch v. Orient Ins. Co., 108 N. Y. 56; Gulf City Ins. Co. v. Stephens, 51 Ala. 121; Mobile Ins. Co. v. Walker, 58 Ala. 290; Miller v. Mutual Benefit Ins. Co., 31 Iowa 216; Butler v. St. Louis Ins. Co., 45 Iowa 93; Gere v. Council Bluffs Ins. Co., 67 Iowa 272; Reed v. Washington Ins. Co., 138 Mass. 572; Clement v. British American Ins. Co., 141 Mass. 298; Ins. Co. v. Tobin, 32 Ohio St. 77; Girard Ins. Co. v. Braden, 96 Penn. St. 81; Continental Ins. Co. v. Pruitt, 65 Tex. 125.

There will often be cases also where the opinion of a witness who is skilled in the dealings of the insurance market, or in the deduction of insurance risks, is equally necessary and proper. It may be impossible, for instance, to show as a fact that underwriters have generally agreed to classify certain risks in a certain way, and yet it might be perfectly clear to the judgment of all who were familiar with the business, that there really was a general concurrence. In all such cases the opinions of experts are admissible to show the deduction of underwriters generally. And, whether there is such general concurrence or not, the jury are not bound by it, but must still determine for themselves what would be the deduction of a reasonable and prudent man, thoroughly informed and skilled in the matter; and, to this end, the jury have a right to be assisted in making the necessary deductions by the opinions of persons skilled in making them, who will give their own judgment as to the effect of a fact upon the risk.

There has been some attempt to distinguish between these two kinds of opinions, and to exclude the latter while admitting the former; but there seems to be no ground for this; Webber v. Eastern R. R. Co., 2 Met. 147; Daniels v. Hudson River Ins. Co., 12 Cush. 416; Marshall v. Union Ins. Co., 2 Wash. C. C. 357; Moses v. Delaware Ins. Co., 1 Wash. C. C. 385; Leitch v. Atlantic Ins. Co., 66 N. Y. 100; Cornish v. Farm Building Ins. Co., 74 N. Y. 295; Appleby v. Astor Ins. Co., 54 N. Y. 253; Hobby v. Dana, 17 Barb. 111; German American Ins. Co. v. Steiger, 109 Ill. 254; Stennett v. Penn. Ins. Co., 68 Iowa 674; Hawes et al. v. N. E. Ins. Co., 2 Curtis C. C. 229; Hill v. Lafayette Ins. Co., 2 Mich. 476; Kern v. South St. Louis Ins. Co., 40 Mo. 19; Martin v. Franklin Ins. Co., 42 N. J. Law 46; Protection Ins. Co. v. Harmer, 2 Ohio St. 452; Hartman v. Keystone Ins. Co., 21 Penn. St. 466. And many cases where the question was not raised as to the admissibility of the evidence; Gamwell v. Merchants' Ins. Co., 12 Cush. 167; Allen v. Massasoit Ins. Co., 99 Mass. 160.

The only confusion remaining in the cases arises in applying these principles, from the natural difficulty of universal agreement in cases varying as to their facts, as to the exact limit where the facts cease to present a question involving peculiar skill or knowledge, and are brought within the range of knowledge of ordinary men. Up to one point, at any rate, the cases generally agree, — that no insurance expert certainly, and in simple cases no expert, can be asked his opinion as to whether a stated fact increases the liability of a building to be injured by fire; the only subject upon which an insurance expert can give an opinion is the more technical one of the materiality of the fact in an insurance risk.



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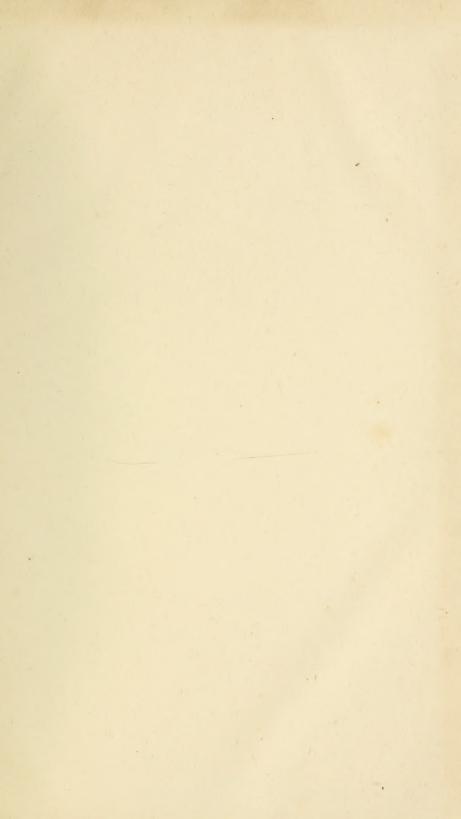
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